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United States Circuit Court of Appeals

For the Ninth Circuit

No. 3952

GREAT NORTHERN RAILWAY COMPANY, a CORPORATION, and BELLINGHAM BAY IMPROVEMENT COMPANY a CORPORATION,
Appellants

VS.

ALBERT R. McPHEE and FRANCES McPHEE,
Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This suit was brought by the plaintiffs to hold the defendants as trustees of the title to the W½ NW¼, and NW¼ SW¼, Section 12, Township

39 N., R. 6 E. W. M., Whatcom County, Washington.

The plaintiffs attached as exhibits to their second amended complaint a transcript of the proceedings of the United States Land Department in two cases—the first, a homestead application by the plaintiff, Albert R. McPhee, for the land in controversy; the second, a homestead application by John W. Thurston and contested by him with the St. Paul, Minneapolis & Manitoba Railway Company for the E½ NW¼ and NE¼ SW¼, Section 12, Township 39 N., R. 6 E. W. M., lying immediately east of and contiguous to the McPhee homestead claim.

By the second amended complaint and the accompanying land office records it was shown that the land in controversy in the present case, while still unsurveyed, was selected by the St. Paul, Minneapolis & Manitoba Railway Company, predecessor of the Great Northern Railway Company, on May 9th, 1902, under the Act of Congress approved August 5th, 1892, 27 Stat. at L. 390, Chap. 382; that the official plat of survey was filed on February 6th, 1907; that on the 23rd of said month the Railway Company reselected the land, conforming

the description thereof to the official survey, and that patent therefor was issued to the Great Northern Railway Company on July 24th, 1919 (Defendants' Exhibit "E"). Part of the land was afterwards sold by the Great Northern Railway Company to the Bellingham Bay Improvement Company. The theory of the second amended complaint was that on May 9th, 1902, the date of the filing of the Railway Company's selection list, the land was occupied by one Dan O'Donnell, a homestead claimant, and was therefore not subject to selection, since the Act of May 9th, 1902, limited the right of selection to land as to which at the time "no right or claim had attached or been initiated" in favor of another.

The plaintiffs alleged that they had succeeded by successive transfers to the settlement rights of Dan O'Donnell and deraigned their title as follows: The land in question was settled upon by one C. C. Cole in the summer of 1901; in October, 1901, Cole transferred his rights to Daniel O'Donnell; in the spring of 1906 O'Donnell transferred his claim to John W. Thurston; in November, 1906, Thurston conveyed his claim to Peter Beebe, and in September, 1909, Beebe conveyed to the plaintiff, Albert R. McPhee (Tr. 2, 3).

It was also shown by the amended complaint and the accompanying exhibits that the adjoining land, namely the SE¼ SW¼ of Section 1, the E½ NW¼ and the NE¼ SW¼ of Section 12, was patented to John W. Thurston after a contest with the defendant Railway Company as to the three forties in section 12. (Tr. 6, 114-208.)

Thurston's chain of title was as follows: In 1901 one Al Small, who was working for C. C. Cole (mentioned in the McPhee Land Office proceedings), settled on the land; in March, 1902, Small transferred his rights to Dan O'Donnell. (Later proceedings in the Thurston case developed that Small was never a claimant of the land, but that Cole, the actual claimant, hired him to do some work on a cabin.) In the fall of 1906 O'Donnell transferred his claim to Thurston, who settled there in December, 1906, and afterwards received patent (Tr. 121, 122).

It will thus be seen that the claims of Thurston and McPhee are directly in conflict with each other, in that they both claim under rights initiated by Dan O'Donnell and his predecessor Cole. It is the settlement of O'Donnell which is alleged to have exempted the land here in controversy from

selection by the defendant Railway Company. Thurston obtained patent to the adjoining 120 acres in a contest with the Railway Company by proving that the settlement and improvements of O'Donnell and Cole were on the lands claimed by Thurston. The present suit is based upon the claim of McPhee that the Land Department erred in refusing to award him the 120 acres adjoining Thurston's, upon the ground that the settlement of O'Donnell was upon the McPhee claim, and not upon the Thurston claim. The Land Department declined to so hold, saying:

"From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the railway selection by virtue of O'Donnell's settlement. McPhee failed to show any privity with O'Donnell, or exactly what land O'Donnell claimed under this settlement. Further, the settlement of O'Donnell is the same as that asserted by Thurston as transferee from O'Donnell. Thurston's application was allowed on the basis of O'Donnell's settlement right. The petition, however, asserts that if the showing made in the affidavits submitted by McPhee is correct, the action of the department in allowing Thurston's application was erroneous and that a suit to set aside the patent issued to Thurston might be instituted. Thurs-

ton's final proof, which was substantiated by a field investigation, disclosed that he established residence in December, 1906, lived continuously upon the land with his family, cultivated about one acre and had a house, barn and other improvements valued at $3,000.

"O'Donnell's settlement claim in any event could not exceed 160 acres. O'Donnell was not in privity with McPhee but was with Thurston. The particular 160 acres claimed by O'Donnell was asserted by Thurston to be the same tract applied for by him and was so determined by the department without objection from McPhee. McPhee purchased Beebe's relinquishment after Beebe's application had been rejected, and failed to file any protest against the allowance of Thurston's entry, final proof, or the issuance of patent thereon. He further delayed for a period of over a year since the final decision of the department against him before filing the present petition. The department, therefore, sees no reason sufficient to warrant a recall of its former ruling." (Tr. 80, 81.)

To the second amended complaint, showing the above facts, the defendants entered their motion to dismiss for want of equity, contending, among other things, that the issue determined by the Land Department as to the situs of the original O'Donnell claim was one of pure fact and therefore conclusive upon the court (Tr. 209-211). This

contention was not sustained and the motions to dismiss were overruled (Tr. 212-224).

The defendants then answered, admitting many matters of record, but denying all allegations of fraud and mistake in the selection of the land, and specifically denying that at the time of the selection the land was occupied or claimed by any adverse claimant, and alleging, on the contrary, that it was vacant and unappropriated and of the character contemplated by the Act of August 5th, 1892. The defendants also denied any error by the Land Department and pleaded the patent of the United States issued to the defendant Railway Company on July 24th, 1919, and the subsequent transfer by the Railway Company of part of the land to the Improvement Company, and by cross-complaint prayed that their own title be quieted against the claims of plaintiffs (Tr. 225, 232).

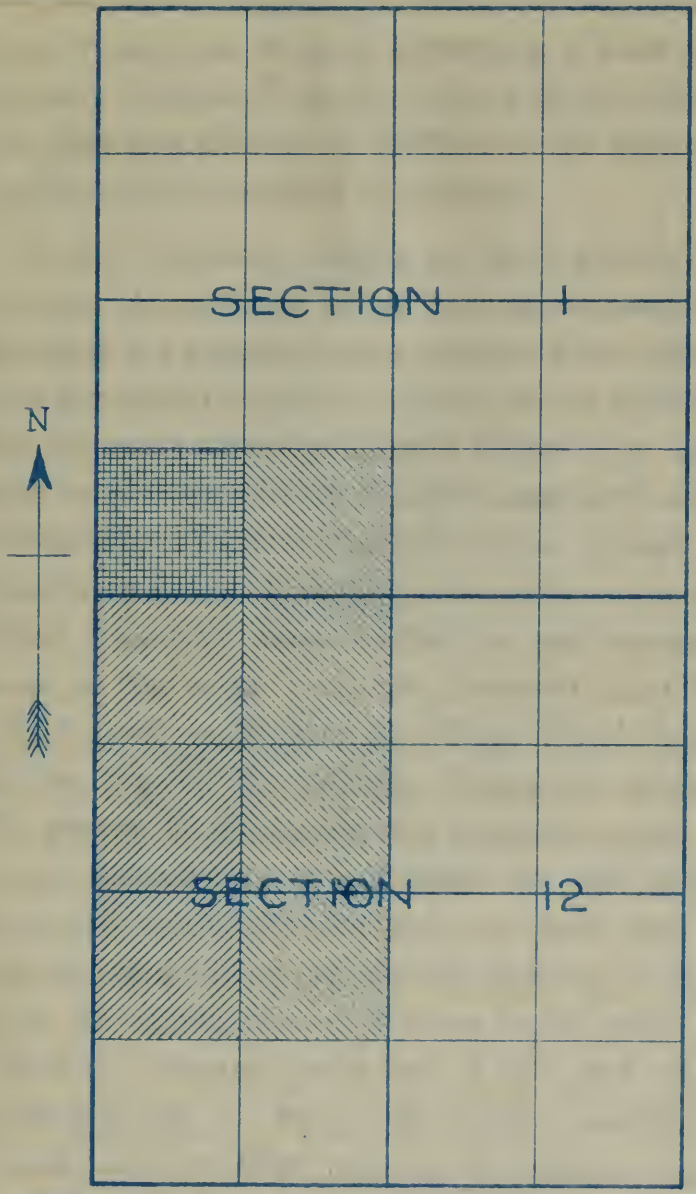
The case was tried before Judge Neterer, who held that the evidence sustained the fact "contended for in the bill of complaint," and rendered a decree for the plaintiffs (Tr. 266, 268). This appeal followed.

THE EVIDENCE IN THE LAND DEPARTMENT

Since one of the leading contentions on this appeal is that the decision of the district court is simply a review and reversal of the determination of the Land Department on a question of fact as to whether the O'Donnell claim (assuming that one was initiated) covered the land heretofore patented to Thurston or that now claimed by McPhee, it becomes necessary to set out the evidence, pro and con, relative to the acts and claims of O'Donnell and his successors. That evidence appears in full in Exhibits "A" and "B" attached to the second amended complaint (Tr. 11-208), but must be summarized and rearranged for intelligible reading. The accompanying diagram will assist the court in following the testimony:

The exhibits attached to and made a part of the second amended complaint, disclose that the decision of the United States Land Department declining to hold that the land in controversy was excepted from selection by the Railway Company by virtue of the O'Donnell settlement, was based

PART OF TOWNSHIP 39 NORTH, RANGE 6 EAST, W.M.



upon voluminous evidence presenting a clear conflict as to whether O'Donnell, when a settler, claimed the land now claimed by McPhee or the adjoining land heretofore patented to Thurston.

In the following synopsis we have placed, side by side, the evidence of the various witnesses respecting the settlement and tenure of the successive homestead claimants. Many of the witnesses for Thurston afterwards made affidavits or testified for McPhee. In the Thurston case their sworn testimony was that O'Donnell's claim covered the same land as the Thurston homestead; in the McPhee case their sworn affidavits and testimony were to the effect that not Thurston's, but McPhee's land, was that which O'Donnell had claimed at the time of the Railway Company's selection. To present to this court the evidence before the Land Department, as disclosed by the second amended complaint, and thus to show that the decision of the Land Department declining to entertain the application of McPhee to set aside the Railway Company's selection of the land was a determination of fact, will require considerable space, but in no other way can the essential nature of the Land Department's decision be presented.

EVIDENCE BEFORE LAND DEPARTMENT

SETTLEMENT OF C. C. COLE

Allegations of Second Amended Complaint.

"In the summer of 1901, one C. C. Cole was a person over twenty-one years of age, qualified to enter the public lands of the United States, and acquire title thereto under such homestead laws; and said Cole settled upon said lands and claimed the same with the intention of acquiring title as a homestead when said lands should be open to such entry.

"Said Cole erected a home, opened roads, and proceeded to improve the same until in the month of October, 1901, when he sold his improvements and right of occupancy to one Daniel O'Donnell." (Tr. 2.)

Affidavit of Al Small in McPhee Record.

"Al Small being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of forty-six years, and that his present post office address is Ferndale, R. F. D. No. 1,

Washington. That he has been well acquainted with the location and character of lands embraced in Section 1 and Section 12, Township 39, North of Range 6 East W. M., since the fall of 1901. That in the fall of 1901 at the request of one C. C. Cole and employed by said Cole, affiant went upon the *Southwest quarter of the Northwest quarter of Section 12*, Township 39, North of Range 6 East, and did some work and made some improvements for the said C. C. Cole and blazed and opened a trail from said land to the county road, and commenced the erection of a cabin upon said forty, which was of approximtaely the size of 12x18 feet. That affiant partly constructed said cabin, and that the said C. C. Cole occupied the same and settled upon the *West half of the Northwest quarter of Section 12, and the West half of the Southwest quarter of Section 12*, Township 39, North of Range 6 East, W. M., and claimed the same as a homestead about the first of September, 1901. That affiant knows of his own knowledge that the said C. C. Cole continued to occupy said land and claim the same as a homestead up until the month of October, 1901, on which date the said C. C. Cole sold and transferred his rights to said homestead and the improvements thereon to one Dan O'Donnell. That affiant knows that said O'Donnell immediately after the purchase of said improvements from said Cole, went upon said land and occupied the same as a homestead and completed the construction of the cabin started upon said land. That affiant was a witness for one John W. Thurston at the

time of a hearing in the United States Land Office at Seattle, at which time the said John W. Thurston was attempting to prove that there had been a prior right of homestead and settlement upon certain lands which he claimed as a homestead, said priority being for the purpose of defeating script filed by the St. Paul, Minneapolis & Manitoba Railway Company on such land. That affiant at said hearing testified that the improvements to which he testified were located upon the Southwest quarter of the Northwest quarter of Section 12, Township 39, North of Range 6 East, W. M. That affiant is well acquainted with the land upon which patent was finally issued by the United States Government to John W. Thurston, and affiant knows of his own knowledge that no improvements were ever made upon any of such lands prior to the time the same were made by said Thurston, which affiant believes to be about the year 1906. That affiant knows of his own knowledge that the improvements used by said Thurston to establish his prior right upon the land which he claimed as a homestead were the same and identical improvements as hereinbefore mentioned by affiant as being located upon the Southwest quarter of the Northwest quarter of Section 12." (Tr. 88, 89.)

Testimony of Al Small in Thurston Record.

"Q. Are you acquainted with the tract now embraced in the homestead of John W. Thurston in Section 12?*

"A. Yes sir.

"Q. How long have you been acquainted with that tract of land?

"A. Since the latter part of August, 1901. * * *

"Q. What were you doing there?

"A. Building a trail and making preparations for building a cabin.

"Q. For what purpose was you building the trail and doing the work you have just stated?

"A. I was hired to do it.

"Q. By whom?

"A. C. C. Cole. * * *

"Q. Cole was then the first settler on the land?

"A. Cole was the original locator.

"Q. And at what time did he make his settlement?

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* "The homestead of John W. Thurston" was the SE¼, SW¼, Sec. 1, the E½, NW¼ and NW¼, SW¼, Sec. 12, Twp. 39 N, R 6 E., W. M., and was so described in his contest with the Railway Company, at which this testimony of Small was given. (Tr. 136.)

"A. He made his settlement as near as I can remember in July, 1901.

"Q. Did he establish a residence at that time?

"A. He established a residence, but he lived on the section line north of there; he didn't live in that cabin.

"Q. Did he claim other lands in another section north?

"A. No, no other lands.

"Q. Was his residence on the section line north made with the intention of retaining this land?

"A. Yes sir.

"Q. And did he at that time suppose himself to be on this particular tract when he made his residence there?

"A. He was just stopping there while I was doing this work for him—building this cabin; just a stopping place.

"Q. Did he ever establish a residence in this cabin you built on this tract?

"A. No sir, he transferred the work I done to O'Donnell before it was completed.

"Q. Did he intend to be a settler?

"A. Yes sir.

"Q. He made these improvements for himself intending to become a settler?

"A. Yes sir, for himself.

"Q. Was it his intention to take the land as a homestead?

"A. Yes sir.

"Q. And was it for that purpose these improvements and settlement and work was done?

"A. Yes sir.

"Q. With a view to making a settlement on the land?

"A. Yes sir, a settlement." (Tr. 142-147.)

Affidavit of Dan O'Donnell in McPhee Record.

"Dan O'Donnell, being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of thirty-five years, and that his present post office address is Deming, Washington. That on or about the first of October, 1901, he purchased from one C. C. Cole all improvements and rights which the said C. C. Cole had in certain lands claimed as a homestead located near Glacier, Washington. That affiant immediately after said purchase entered into possession of said lands and improvements thereon and finished the completion of a cabin which had been started by said Cole, and did some additional work on the trail and a little clearing. That affiant transferred whatever right or interest he had in said land and the improvements thereon, to one John

W. Thurston in the spring of the year 1906. That it was the understanding of affiant that he had no rights in any land except such as he had purchased from one C. C. Cole, and that he paid the said C. C. Cole for the relinquishment of his rights and improvements the sum of One Hundred Dollars ($100.00), and that he transferred his rights to John W. Thurston for the consideration of One Hundred Dollars ($100.00). That it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole. *That affiant is not acquainted with the legal description of said land according to the new survey of the same made in 1907 and is unable to state from his own knowledge the exact legal description of the land acquired by him from Cole and transferred by him to John W. Thurston.*" (Tr. 91, 92.)

Testimony of Dan O'Donnell in Thurston Record.

"Q. Where do you reside, Mr. O'Donnell?

"A. At Lawrence at present.

"Q. And what's your business?

"A. Working in the logging camps.

"Q. Where did you reside in 1901?

"A. At Maple Falls. I had charge of a mine.

"Q. Are you acquainted with the *North half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Section 12*, Township 39 North, Range 6 East?

(Some stress was laid by McPhee's counsel in his petition to the Secretary of the Interior for the exercise of supervisory authority on the fact that in this and similar questions asked by Thurston's attorneys of several witnesses in the Thurston contest, the land described contained, in fact, part of the land McPhee now claims, viz.: the NW¼ NW¼ of section 12; and the argument was made that these witnesses might really have been testifying that the improvements of which they spoke were on McPhee's claim. However, neither in this nor any other question did the description contain the *Southwest quarter of the Northwest quarter of Section 12*, which is the forty on which McPhee and his witnesses swore the Cole and O'Donnell cabin was built. (Tr. 21, 35, 36, 38, 84, 86, 88, 91, 101.) In short, in the question just quoted, and in similar questions asked other witnesses in the Thurston contest, the only part of the McPhee claim mentioned was the Northwest quarter of the Northwest quarter of Section 12, on which no one

asserted that any improvements were ever placed; and in the same questions the witnesses were asked about three forties of the Thurston homestead, namely, the East half of the Northwest quarter and the Northeast quarter of the Southwest quarter of Section 12; consequently, in their answers the witnesses plainly referred to a settlement upon one of these three forties.)

"A. Yes, sir.

"Q. When were you first on that land, Mr. O'Donnell?

"A. When did I first go on there?

"Q. Yes?

"A. Near about—I can't give the exact date, but it was in August either the last or near about the first of September, 1901.

"Q. 1901?

"A. Yes, sir.

"Q. And what was the occasion of your presence on that land, how did you come to be there?

"A. I was looking for a homestead and I happened up that way.

"Q. Just go on and state how you acquired that homestead, if you did acquire it?

"A. It was through my father that I was informed a squatter wanted to sell his right, as you would call it, I suppose.

"Q. What was the name of the squatter?

"A. Why Mr. Cole was the name. So, I went up to see him, and I looked the claim over and I paid him one hundred dollars for the location fees. He had a trail in there and had started a cabin. (Tr. 151-152.)

Affidavit of Albert R. McPhee in McPhee Record.

[McPhee never mentioned Cole until in 1916 (p. 52), the time of his second petition to the secretary of the interior for the exercise of supervisory authority (Tr. 63-67), although his homestead application was originally rejected on September 28th, 1909 (Tr. 14), and in the meantime he had appealed to the general land office and to the secretary of the interior (Tr. 19-23); had applied to the secretary of the interior for a rehearing (Tr. 27-29); had moved for a review of the secretary's decision after rehearing (Tr. 31-32); had written Hon. W. J. Bryan, secretary of state, for "somewhat of an idea of what to do" (Tr. 47-48); and had filed a first petition for the exercise of supervisory authority (pp. 48-62).]

"That in 1901 a cabin was constructed upon the southwest quarter of the northwest quarter of said section 12, by one C. C. Cole. That at the time of the construction of said cabin, all rights in and to the improvements and in and to the rights of the claimant C. C. Cole as a homesteader, for a good and valuable consideration of One Hundred Dollars, were transferred by said C. C. Cole to one Dan O'Donnell, who immediately entered into possession of said improvements, and claimed a homestead right on the following real estate:

"*The west half of the northwest quarter, and the northwest quarter of the southwest quarter*, of section 12, township 39, north of range 6 east W. M." (Tr. 101.)

(McPhee does not state how he knows these things, which occurred eight years previous to his locating there.) (Tr. 15.)

Protest and Affidavit of John W. Thurston in Thurston Record.

"In the Matter of List No. 4, St. Paul, M. & M. Ry. Co., embracing the *E½ NW¼, NE¼ SW¼* Section 12, Township 39 N., Range 6 E.

"Comes now John W. Thurston, by his attorney Edward M. Comyns, and protests against the certification of the above numbered list of the above

named railway company, and the passing to patent of the land embraced therein, in so far as it includes the above described land, and asks that a hearing be ordered at which he may be permitted to establish the fact that the above described land was not on the date of its selection subject thereto, and in support of said protest and request submits the attached affidavit.

E. M. COMYNS,
Attorney for John W. Thurston.

"John W. Thurston, being first duly sworn, deposes and says: I am residing upon the above described tract of land, my postoffice address being Maple Falls, Washington. I have been acquainted with the said land for the past ten years. The land was first settled upon within my knowledge in the year 1901, by Alfred Small who built a cabin thereon and made other small improvements in the way of clearing, trails, etc., residing on and occupying the land until March, 1902, when he transferred his improvements and claim to Daniel O'Donnell." (Tr. 121-122.)

Testimony of John W. Thurston in Thurston Record.

"Q. You are the homestead applicant for the land that is involved in this case in section 12, Mr. Thurston?

"A. Yes, sir.

"Q. When did you first become acquainted with that land?

"A. In the fall of 1901 between July and Christmas.

"Q. And what was the condition of that land at that time?

"A. I was up looking timber over and I ran across a trail and a small improvement started as a cabin.

"Q. Do you know to whom this improvement belonged?

"A. Only by inquiring. I inquired when I came back and it was stated to me that Mr. Small had done the work.

"Q. That Mr. Small had done the work?

"A. Yes.

"Q. And was that how you came to make affidavit that those improvements were done by Mr. Small?

"A. I understood he did the work there and that he was going to take it as a homestead." (Tr. 157-158.)

Testimony of Herbert E. Leavitt in Thurston Record.

"Q. Where do you reside, Mr. Leavitt?

"A. At Maple Falls.

"Q. What is your occupation?

"A. Blacksmith and rancher.

"Q. Are you acquainted with the tract of land as embraced in Mr. Thurston's homestead application?

"A. Somewhat; yes.

"Q. When were you on that land, if at all?

"A. I have been on it twice. I was on it in 1901 and 1902.

"Q. About what part of the year 1901 were you on it?

"A. In October about the 26th or 27th; somewhere along there.

"Q. And what was the condition of that land at that time?

"A. Somebody had started a foundation for a cabin in there, that I saw when I came through there." (Tr. 154-155.)

SETTLEMENT OF DANIEL O'DONNELL

Allegations of Second Amended Complaint

"Said Cole erected a home, opened roads, and proceeded to improve the same until in the month of October, 1901, when he sold his improvements and right of occupancy to one Daniel O'Donnell, who was a citizen of the United States, and qualified to enter lands and acquire title under the homestead laws, and he, at once took possession of said

lands with the intention of acquiring title thereto, under the homestead laws, and he established a residence thereon, built houses and sheds, fenced and cleared ground, and posted notices showing the particular lands claimed by him, and continued to reside on said lands until in the spring of 1906, when for a valuable consideration he sold and conveyed his possessory rights to one Thurston." (Tr. 2.)

Allegations of McPhee in McPhee Record.

O'Donnell is not mentioned in McPhee's appeal to the commissioner of the general land office. (Tr. 15.) In that document Peter Beebe is referred to as the only "former homesteader," and it is alleged that he "located on said lands on the 16th of August, 1906." (Tr. 15.)

In the first appeal to the secretary of the interior it is alleged that "one Peter Beebe, * * * was the original successor of one Dan O'Donnell, who in September, 1896, went upon and claimed said land as a homestead." (Tr. 21-22.) Elsewhere it is always claimed that O'Donnell succeeded Cole in 1901.

J. H. Cannon, McPhee's attorney, in his brief to the secretary of the interior on the petition for

review, set out the relation of the McPhee case to the Thurston case and prayed that both records be examined in passing upon the McPhee application:

"O'Donnell * * * was occupying said land which said McPhee acquired with improvements thereon at the time, viz., May 9th, 1902, when said scrip claimant made the selection of said land hence said land was not subject to scrip location; this fact has been determined by your Honor in the case of John W. Thurston v. St. Paul, Minneapolis & Manitoba Railway Co.," etc. (Tr. 27.)

Mr. Cannon further stated:

"That I most urgently assert that the same improvements which was taken into consideration in said cause is the same identical improvements and were then owned and held by said McPhee and are upon his land; hence *I most respectfully urge that said case be taken into consideration by this Honorable Department as a part and parcel of this McPhee case as very material.*" (Tr. 28.)

In McPhee's motion for review of the secretary's decision, it is alleged:

"That the land involved in this application is the *W½ of the NW¼ and the NW¼ of the SW¼* of Sec. 12, T. 39, N. R. 6 E. W. M., Seattle, Land District.

"That the claim of title or right to said land by McPhee is as follows: *that upon the south forty*

acres of the W½ of NW¼ is the improvements of former claimants, 'Al Small' and 'Dan O'Donell,' J. W. Thurston—Peter Beebe and Final Claimant.

"That this Honorable Department did, in decision rendered by it upon March 19, 1910, in case No. 'E-2630' case of John W. Thurston v. St. Paul Minneapolis & Manitoba Ry. Co., hear and decide that it was shown that by coroborated affidavits that said land was occupied and improved by 'Dan O'Donell' upon the 9th day of May, 1902, the date of the selection by said scrip claimant and therefore not subject to scrip entry; and that a hearing was ordered, assuming the position that said O'Donell improvements was upon other land of Thurston's adjoining this claim now in controversy; said decision being made by the Honorable First Assistant, Sec. Frank Pierce; *which said decision applicant expressly refers your Honor to. And affidavits therein and make it a part of this, his motion for review.*" (Tr. 31-32.)

In his affidavit of April 18th, 1911, supporting his motion for review of the secretary's decision, McPhee swore:

"That said improvements (which are previously alleged to have been used and resided in by one Al Small and one Dan O'Donnell) were upon the *south forty acres of the W½ of the NW¼* of Sec. 12, T. 39 N., R. 6 E. * * * Dan O'Donnell * * * as affiant verily believes held and accept-

ed said land and resided in said residence upon May 9th, 1902, the date of the selection of the same by said scrip claimant. * * * That the accompanying photo is a true picture from the north end of said building and improvements therein erected there by said Al Small and acquired by said O'Donnell and said Thurston—and Beebe—and finally claimant. That I have measured the distance from the line upon the west side of J. W. Thurston's land and that said building and improvements is approximately 40 rods in distance from the land of said Thurston and thoroughly (?) understood was and is upon said land of claimant aforesaid—which was transferred and acquired by said Peter Beebe, my predecessor as aforesaid.

"That said land was acquired by Al Small in the year of 1901 occupied by him until the month of March, 1902, when he disposed of the same to said Dan O'Donnell he occupied the same until the fall of 1906 when said O'Donell disposed of the same to Thurston." (Tr. 38-39.)

Evidence of Thurston in Thurston Record.

In Thurston's protest and affidavit of September 29th, 1909, in his contest with the Railway Company, "In the Matter of List No. 4, St. Paul, M. & M. Ry. Co., embracing the *E½ NW¼, NE¼ SW¼* Section 12, Township 39 N., Range 6 E." he alleged:

"The land was first settled upon within my knowledge in the year 1901, by Alfred Small who built a cabin thereon and made other small improvements in the way of clearing, trails, etc., residing on and occupying the land until March, 1902, when he transferred his improvements and claim to Daniel O'Donnell. Daniel O'Donnell, immediately upon acquiring possession commenced his residence on this land and continuously occupied the same until the fall of the year 1906 said Daniel O'Donnell during all of said period being qualified to make homestead entry and occupying land with a view to make said entry. In October, 1906, Daniel O'Donnell conveyed to me all his right and title to this land, together with the improvements thereon. *I took up my residence on the land in December, 1906, and have lived there continuously ever since,* and the improvements placed by me on said land are today reasonably worth the sum of $2,000. I was at all times up to February 6, 1907, the date of the filing of the plat of said township 39 N., range 6 E., entirely ignorant of the fact that the St. Paul, M. & M. Railway Company was laying any claim to this land. On May 9, 1902, the date of the filing of selection by the Railway Company, *the land above described* was actually occupied and improved, which occupation and improvements were readily discernible by the most casual inspection." (Tr. 121-122.)

At the hearing of his contest, he testified:

"Q. You are the homestead applicant for the land

that is involved in this case in section 12, Mr. Thurston?

"A. Yes, sir."

This was followed by his testimony relative to the building of the cabin by Al Small, which we have quoted under the heading "Settlement of C. C. Cole" on page 22. Thurston then continued:

"Q. Now when were you there again?

"A. I was there again between January and April, 1902. There was snow on the ground.

"Q. Describe the improvements at that time.

"A. I went up the same trail and across the same section and the cabin was completed and this man O'Donnell was living there.

"Q. O'Donnell was living there?

"A. Yes.

"Q. Now how far from this land were you living at that time?

"A. About five miles; four and a half.

"Q. That was in the year 1902?

"A. Yes.

"Q. And have you lived there ever since?

"A. Yes sir.

"Q. Well between 1902 and 1906 where were you living?

"A. In 1904 I went up to Warnick, and that is just about a mile and a half from this same piece of land; it is a railroad station.

"Q. Do you know who was living on this land between the interval elapsing between the time you first saw it and 1902?

"A. Mr. O'Donnell.

"Q. What was the value of those improvements that were there in 1902, a rough estimate?

"A. Oh, I don't think a man could put them in there for less than $200, I guess, if he would hire it done he couldn't; hire it put in there.

"Q. Then you knew the land in May 1902?

"A. Yes sir.

"Q. And was that land unoccupied vacant land at that time?

"A. Well, Mr. O'Donnell had that homestead.

"Q. Mr. O'Donnell was occupying it?

"A. He was occupying it, Yes.

"Q. When did you acquire any title to this land, any claim to it, Mr. Thurston, and by what process?

"A. I was living a mile or so down there, and I found out I had better take my homestead right and use it, and so I went to O'Donnell and I says to him, what would he take for his improvements he had got up there, and says, 'I don't know.' I says, 'If you don't sell out somebody is going to jump you on this

continued residence proposition;' and he says,' I know it, but it's pretty hard for me to live up there and have to work, too.' So I says, 'I will give you a hundred dollars for your improvements and go ahead with the work and make it my home, because I am going in there some place;' and he says, 'All right'; and I paid him the money and took a receipt.

"Q. When was that?

"A. The receipt shows that. I think it was March 26th, 1902.

"Q. Is that the receipt which you received from him?

"A. Yes sir.

"Q. Refreshing your memory from that receipt, what date did the transfer occur?

"A. October 22nd, 1906. I rode out there in a hurry and asked him for a receipt for my money, and he gave me that.

"Q. Now, Mr. O'Donnell was working in the vicinity of the land during all those times, was he, freighting there?

"A. Yes, freighting there, and he did most of the time." (Tr. 157-160.)

Affidavit of Dan O'Donnell in McPhee Record.

"Dan O'Donnell, being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of Thirty-five years, and that his

present Post Office address is Deming, Washington. That on or about the first of October, 1901 he purchased from one C. C. Cole all improvements and rights which the said C. C. Cole had in certain lands claimed as a homestead located near Glacier, Washington. That affiant immediately after said purchase entered into possession of said lands and improvements thereon and finished the completion of a cabin which had been started by said Cole, and did some additional work on the trail and a little clearing. That affiant transferred whatever right or interest he had in said land and the improvements thereon, to one John W. Thurston in the spring of the year 1906. That it was the understanding of affiant that he had no rights in any land except such as he had purchased from one C. C. Cole, and that he paid the said C. C. Cole for the relinquishment of his rights and improvements the sum of One Hundred Dollars ($100.00), and that he transferred his rights to John W. Thurston for the consideration of One Hundred Dollars ($100.00). That it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole. *That affiant is not acquainted with the legal description of said land according to the new survey of the same made in 1907 and is unable to state from his own knowledge the exact legal description of the land acquired by him from Cole and transferred by him to John W. Thurston.*" (Tr. 91- 92.)

Testimony of Dan O'Donnell in Thurston Record.

"Q. Are you acquainted with the *North half of the Northwest quarter, the southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter* of Section 12, Township 39 North, Range 6 East.

"A. Yes sir.

(The witness then testified to the purchase of Cole's improvements, as quoted on pages 18 and 19 of this brief). He then proceeded:

"Q. And what did you do then?

"A. Why I started to work on the cabin. I was back and forth; Every little spare time I could get I would go out there and do a little work. Of course, it was a little inconvenient to get in there, but I worked on the place the best I could.

"Q. When was the cabin completed?

"A. Near about in March, as near as I can judge, 1902.

"Q. And did you furnish it?

"A. I bought a little supplies and took in there; a stove and stuff I bought at Maple Falls; a bachelor's outfit.

"Q. Did you post any notices indicating what land was claimed by you?

"A. Yes sir.

"Q. *And was that the same land I described to you?*

"A. *Yes sir.*

"Q. *Were you occupying that land in the month of May, 1902?*

"A. *Yes sir.*

"Q. *On May 9th, 1902.*

"A. *Yes sir.*

"Q. *The date the St. Paul, Minneapolis & Manitoba attempted this selection?*

"A. *Yes sir. I was on there before they ever selected. I was right on the trail between the hills there.*

"Q. Then your claim had attached in May 1902?

"A. Yes sir.

"Q. And the land was in no sense unoccupied land on that date?

"A. Yes sir.

"Q. Was there anyone else claiming it outside of yourself?

"A. No sir.

"Q. Were there any cabins on any of the other forties claimed by you?

"A. No sir, I was all over the land. Me and other parties that appeared there.

"Q. What was the value of the improvements that were there on that land on the 9th day of May, 1902?

"A. Well, do you mean what it cost me for what I had in the cabin and all-

"Q. Yes, put it all together, figuring your own labor and the labor of anyone that helped you?

"A. $150 for the cabin.

"Q. And it had cost you that up to May 1902?

"A. Yes sir.

"Q. Now you did some trail work there, didn't you?

"A. Yes.

"Q. Were these improvements readily discernible to anyone making an examination of this claim?

"A. Yes.

"Q. And was this trail that led up to your cabin the only trail on your land?

"A. The only one.

"Q. Was that the only one in May 1902?

"A. Yes sir." (Tr. 151-154.)

Affidavit of Dan O'Donnell in Thurston Record.

After the hearing in the contest between Thurston and the Railway Company, the Assistant Commissioner of the General Land Office rendered an opinion upon the Railway Company's appeal, in which he

pointed out that, although it appeared from O'Donnell's testimony that he was in possession of the Thurston homestead at the time of the Railway Company's selection, there was no evidence that O'Donnell was a "qualified settler." The Assistant Commissioner directed the Register and Receiver of the local Land Office "to call upon Thurston to file the affidavit of Mr. O'Donnell, duly corroborated by two witnesses, as to his qualifications on May 9, 1902, for consideration with the evidence in the case." Thereupon Thurston filed the following affidavit of O'Donnell:

"Dan O'Donnell being first sworn says that he is the identical Dan O'Donnell who testified in the above entitled case at the hearing had before the United States District Land Office at Seattle, Wash., on May 24, 1910. That on May 9, 1902, he was a qualified settler of the *E½ NW¼, NE¼ SW¼* Section 12, Township 39 N., Range 6 E. That on said date he possessed all the qualification requisite to make entry of said land under the homestead laws." (Tr. 181.)

Affidavit of H. E. Leavitt in McPhee Record.

"I, H. E. Leavitt first after being duly sworn say that I am a resident of Whatcom County, State of Washington. That my post-office address is Maple Falls Washington, that I have been acquainted with

the land in Sec. 12, T. 39 N. R. 6 E., and especially the *West half of the Northwest quarter* of said section, both before and after the survey of the same that I have been acquainted with said land for 10 years last past next preceding the making of this affidavit; that the accompanying photograph is a true picture of said O'Donnell cabin upon the *South forty acres of said land* taken from an expose at the north end thereof; that said cabin has been at all times upon said land since the fall of the year 1901. That in the month of April 1902 I was at said cabin and the same occupied and owned at said time by Dan O'Donnell; he had stove provisions and bed and used it as his home; that said cabin is upon the land or claim of said claimant Albert R. McPhee and said photograph contains the likeness of said McPhee and family who now reside upon said land but not in this cabin." (Tr. 35-36.)

Affidavit of H. E. Leavitt in Thurston Record.

At the foot of Thurston's affidavit, already quoted on page 28, in which Thurston swore that the settlement and claim of Dan O'Donnell, embraced the E½ NW¼ and NE¼ SW¼ of section 12, Leavitt made a short affidavit jointly with Herman Steiner, in which they both swore that "they have read the foregoing affidavit of John W. Thurston; that they are of their own knowledge familiar with

the facts set forth and know the same to be true." (Tr. 123.)

Again, when O'Donnell swore "that on May 9, 1902, he was a qualified settler of the E½ NW¼, NE¼ SW¼ of Section 12," Leavitt and Steiner filed affidavits corroborating him. (Tr. 182.)

Affidavit of Al Small in McPhee Record.

This affidavit has already been quoted at page 11. It was to the effect that the claims of Cole and O'Donnell embraced the W½ NW¼ and W½ SW¼ of Section 12, and that the cabin commenced by Cole and completed by O'Donnell was on the SW¼ NW¼ of Section 12. (Tr. 88-90.)

Testimony of Al Small in Thurston Record.

"Q. Are you acquainted with the tract *now embraced in the homestead of John W. Thurston in Section 12?*

"A. Yes sir." (Tr. 142.)

(Then follows testimony relative to his erection of the cabin for Cole, as already partially quoted on pages 13 and 14 of this synopsis.) The witness then continued:

"A. I was there on or about the 20th of November the same year. (1901.)

"Q. And what did you do on that occassion?

"A I went up there to work for Mr. O'Donnell.

"Q. Did you do any work on the place at that time?

"A. Not at that time.

"Q. When did you again do any work, if at all?

"A. The last work I done on the claim was along about the 12th of October.

"Q. The same year?

"A. The same year.

"Q. What other work did you do then?

"A. I laid up one more log and took my tools down off the claim.

"Q. And when were you again on the claim?

"A. The last time was in February, 1902; along about February.

"Q. February 1903 or 2?

"A. 1902. * * *

"Q. And who was occupying the cabin at that time?

"A. Dan O'Donnell.

"Q. Was there anything else in the way of improvements in the month of March, 1902, except this cabin?

"A. There had been trees slashed away, trees that were in danger of falling on the cabin.

"Q. And they would cover what area?

"A. I should judge about one-half of an acre.

"Q. Was there anything additional in the way of trail work?

"A. Yes sir.

"Q. Was there a trail leading to the cabin?

"A. Yes sir, leading to the cabin from the County Road.

"Q. When were you there again, Mr. Small, if at all?

"A. Along in July right after the Fourth.

"Q. That was in July 1902?

"A. In July 1902.

"Q. Who was occupying the cabin then, if any one?

"A. O'Donnell.

"Q. And what was its condition.?

"A. Habitable.

"Q. Did the cabin bear evidence of continuous occupation between March and July, 1902?

"A. Yes sir, it bore such evidence. * * *

"Q. And what was the date he (Cole) made the sale to O'Donnell? About what time?

"A. It was some time in the latter part of August or first of September 1901.

"Q. 1901?

"A. 1901, yes.

"Q. Do you know anything about whether O'Donnell took possession of the improvements at the time of that transfer?

"A. Yes sir, he took possession.

"Q. Did he establish a residence on the land?

"A. Yes sir, he made it his stopping place.

"Q. And how long did he live there?

"A. I do not know.

"Q. Do you know anything about the transfer from him to somebody else—from O'Donnell to some other person?

"A. I know there was a transfer made to someone, but the circumstances I don't know nothing about at all.

"Q. *Do you know when the present claimant took possession of the improvements?*

"A. I don't know the exact date but I know the year.

"Q. What year?

"A. 1906." (Tr. 142-147.)

Affidavits of Fred Benson in McPhee Record.

"I, Fred Benson first after being duly sworn say that I am a native born citizen of the United States. My post office address is Glacier, Washington. That I have been acquainted with the land in Section 12, T. 39 N. R. 6 E. for the last six years last past next preceding the making of this affidavit, *as particularly the south forty of the west* ¾ (½) *of the NW*¼. That I know of my own personal knowledge for the last five years that the Dan O'Donnell improvements was made and are upon said forty last aforsaid and upon the land claimed by said Albert R. McPhee. That I have considerable experience as a photographer and the accompanying photo is a true facsimile or representation of the building or improvements made by said 'Dan' O'Donnell as his predecessors upon said land and the same represents said claimant Albert R. McPhee and family at said cabin upon his said claim that said McPhee does not now reside in said building but has erected him an other residence upon said land. (Tr. 36, 37.)

"Fred Benson, being first duly sworn on oath says: that he is a citizen of the United States of the age of Thirty-seven years, and that his present Post office address is Glacier, Washington. That he has been well acquainted with lands in Section 12 Township 39, North of Range 6 East W. M., for eleven (11) years last past immediately preceding the making of this affidavit. That he

knows of his own personal knowledge that the improvements on the *Southwest quarter of the Northwest quarter of said section* commonly known as the Dan O'Donnell improvements are the same and identical improvements which affiant photographed during the summer of 1910 or 1911 for one John W. Thurston. That affiant knows of his own personal knowledge that said improvements are not upon any part of the land which was finally patented by the United States to said John W. Thurston. That affiant knows of his own knowledge that there were no improvements of any kind or character upon any land upon which patent was finally issued to said John W. Thurston prior to the fall of 1906.

"This affidavit is made supplemental to that affidavit of affiant dated April 18th, 1911, and now a part of the record in this proceeding." (Tr. 90, 91.)

Testimony of John R. Smith in Thurston Record.

"Q. State your full name, Mr. Smith.

"A. John R. or John Robert Smith.

"Q. Where do you reside, Mr. Smith?

"A. At Sumas, Whatcom County, this state.

"Q. What has been your occupation, Mr. Smith?

"A. I have been employed in the Forest Service department as a ranger. * * *

"A. Were you acquainted with the *North half of the Northwest quarter, the Southeast quarter of*

the Northwest quarter, and the Northeast quarter of the Southwest quarter of Section 12, Township 39 North, Range 6 East?

"A. Yes sir, I have been over the ground several times.

"Q. And when were you first there, Mr. Smith?

"A. I was first there in 1901.

"Q. In 1901?

"A. Yes sir.

"Q. And do you recollect what part of the year?

"A. It was in the summer of 1901.

"Q. You stated that you were on the land in 1901?

"A. Yes sir.

"Q. Do you recall about the time of year?

"A. In the summer season, I should judge about June.

"Q. What was the condition of the land at that time relative to improvements or lack of them?

"A. I saw no improvements.

"Q. None at all?

"A. No sir.

"Q. When were you next on the land?

"A. In the spring of 1902.

"Q. Was it prior to May 9th, 1902, or subsequent to that?

"A. It was prior; it was in March.

"Q. In March 1902?

"A. Yes.

"Q. And what did you find there in the way of improvements on that date?

"A. I saw a cabin; that is, a part of a cabin; just the body, some logs put together.

"Q. And upon what particular forty acre tract was that cabin?

"A. *The northeast of the northwest*, I think. I ain't sure about it.

"Q. And was there anything else in the way of improvements that you saw at that time?

"A. Some slashing had been done and some logs cut in front and piled up in a little pile.

"Q. Did it bear evidence of having been recently placed there, or did it appear to have been there a long while?

"A. It appeared to be new at that time?

"Q. And was it a cabin in course of construction?

"A. It was a cabin in course of construction; a log cabin.

"Q. Did you ascertain whose cabin it was, or who was doing the work?

"A. I understood at the time who it was. There was no one present at that time.

"Q. When were you there again after March 1902?

"A. Well, I was there the same month, in March 1902; I was there later and about the first of April.

"Q. And did you notice any difference in the improvements?

"A. Yes sir.

"Q. What difference did you note?

"A. The cabin was completed.

"Q. The cabin was completed?

"A. Yes sir. * * *

"Q. Do you recall what that notice contained?

"A. It contained a description of the land and the time it was settled, but I don't remember the description particularly or the date of settling.

"Q. And how was it signed? Who was it signed by?

"A. By Jack Thurston, or John Thurston.

"Q. Now I will ask you whether there was any trials leading in to the land?

"A. There was a trail.

"Q. Was that the only trail that gave access to this tract?

"A. It was to this particular part of the tract; Yes, the only trail.

"Q. Not to anyone coming in on the trail would these improvements be readily visible?

"A. They would.

"Q. It would be impossible to miss them, would it, if a person came in over that trail?

"A. No, you couldn't miss them; you couldn't pass them on that trail; no.

"Q. When were you there next after March 1902?

"A. I was there in 1903.

"Q. And were the same improvements existent at that time?

"A. Oh yes. I will tell you. I have got some things mixed here now; it has been so long ago. What name did I say was on it?

"MR. COMYNS: Thurston.

"WITNESS: It was O'Donnell. Not Thurston then.

"BY THE REGISTER: Do you wish to correct your testimony in relation to the notice? Do you wish to correct it?

"A. Yes sir.

"BY THE REGISTER: You may do so.

"A. The name was Dan O'Donnell, Mr. Thurston coming in afterwards, I have got them mixed up, being so long ago." * * * (Tr. 137-142.)

Affidavit of E. M. Magner in McPhee Record.

"That affiant knows of his own personal knowledge that at said time (September 1909) there was improvements situated on said *Southwest Quarter of the Northwest Quarter* of Section 12 consisting of a log cabin about 12 feet by 18 feet in size and a well defined trail, which showed that the same had been frequently traveled and used. That affiant states that it was generally known in the community of Glacier, Washington, that said log cabin was placed upon said 40 acre tract of land by one Al Small, and was later transferred by the said Al Small to one Dan O'Donnell, and was known in the community as the O'Donnell improvements. * * * That affiant has been well acquainted with the location and character of the Southeast Quarter of the Southwest Quarter of Section 1, and the East half of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter of Section 12, all in Township 39, North of Range 6 East W. M., for ten years last past, and that affiant knows of his own personal knowledge that there were no improvements of any kind, character or description upon any of said land last described prior to January 1st, 1906, said land last described being the land upon which patent was issued April 29th, 1913, to John W. Thurston." (Tr. 86-88.)

Testimony of Herman Steiner in Thurston Record.

"Q. Where do you reside, Mr. Steiner?

"A. At Maple Falls.

"Q. What is your occupation?

"A. Farmer.

"Q. Are you acquainted with *that tract of land embraced in the homestead application of Mr. John Thurston located in Section 12*, Townishp 39 North, Range 6 East?

"A. Yes sir.

"Q. How long have you been acquainted with that tract of land?

"A. I have known it for about fifteen years.

"Q. Were you on that land prior to May 1902?

"A. Yes sir.

"Q. Upon what date immediately prior to that date were you on the land?

"A. I was there in the Fall of 1901, and early in the spring of 1902, February or March.

"Q. What was the condition of the land in 1901 when you visited it?

"A. There was a log cabin started.

"Q. And when were you there in 1902?

"A. Either February or March; I don't remember which.

"Q. What was the condition of the land at the time you visited it at that time?

"A. There was a cabin built on the land.

"Q. What kind of a cabin was this?

"A. A log cabin, I should judge 14 x 16, the size of it.

"Q. Built of cedar logs?

"A. Yes.

"Q. Was it furnished to any extent?

"A. Yes sir, a good stove in it, cooking utensils and a bed.

"Q. Was anyone occupying it?

"A. Yes sir.

"Q. Who?

"A. O'Donnell; Dan O'Donnell.

"Q. What was the occassion of your presence up there in February or March 1902?

"A. I helped to build the cabin. * * *

"Q. Did you take note of any notices posted on the cabin or on the land when you were there in March?

"A. Yes, there was a notice on the cabin door.

"Q. Do you remember the contents of that notice with reference to the possession of the land?

"A. That he had taken land in Section 12 as a homestead, as near as I can remember it, *giving the description of the land.*

"Q. What did the notice contain?

"A. Why that he as a citizen of the United States claimed this as a homestead.

"Q. Who was it signed by?

"A. O'Donnell and I was a witness.

"Q. Do you know who wrote that notice?

"A. I and him wrote it out together." * * * (Tr. 148-150.)

Steiner also made affidavit to the same effect, in support of the affidavit of Thurston that Dan O'Donnell was a settler upon and claimant of *"the East half of the Northwest quarter and Northeast quarter of the Southwest quarter* of Section 12, Township 39 N., R. 6 E. W. M.," when Thurston filed his protest against the allowance of the Railway Company's selection, which resulted finally in the issuance of patent to him. (Tr. 123.) Later he filed another affidavit, corroborating the affidavit of Dan O'Donnell himself that the latter "on May 9, 1902, was a qualified settler of the *E½ NW¼ NE¼ SW¼, Section 12.* (Tr. 122.) Steiner, as stated in his testimony quoted above, was a witness upon O'Donnell's posted homestead notice, and presumably, therefore, knew what land O'Donnell claimed. He has never given any testimony or made any

affidavit contrary to his testimony and affidavit in the Thurston case.

SETTLEMENT OF JOHN W. THURSTON

Allegations of Second Amended Complaint.

"In the spring of 1906, * * * for a valuable consideration he (O'Donnell) sold and conveyed his possessory rights to one Thurston, who entered upon said lands for the purpose of acquiring title, and he was a qualified citizen and entitled to enter public lands, and he so entered this land for the purpose of acquiring title under the homestead laws and so continued in possession until in November, 1906, when he, for a valuable consideration sold and conveyed his improvements and possessory rights to said land to Peter Beebe." (Tr. 2-3.)

Affidavit of McPhee in McPhee Record.

"Said improvements (those built by Al Small and occupied by Dan O'Donnell) were upon the *south forty acres of the W½ of the NW¼ of Sec.* 12, *T.* 39 *N., R* 6 *E.*, and upon the land prior to my acquiring the same and held by Peter Beebe, who had held the same and acquired the same from one J. W. Thurston, the said Beebe and Thurston in so arranging their respecetive claims so as to come near to the County Road. Said Thurston had paid

and did pay said Beebe $50.00 and surrendered to said Beebe possession of said W½ of NW¼, said Thurston being a successor to said land from and through one Dan O'Donnell. * * *

"In the fall of 1906 * * * said O'Donnell disposed of the same to Thurston — then said Thurston at about said time as affiant believes transfered the the same to Beebe." (Tr. 38-39.)

Affidavit of Peter Beebe in McPhee Record.

"Peter Beebe first after being duly sworn say that I am a native born citizen of the United States of the age of 54 years. My post-office address is Glacier, Washington. I have resided in Whatcom County, State of Washington, for nine years last past next preceding the making of this affidavit. That I have been acquainted with the lands in Sec. 12 T. 39 N. R. 6 E. since the 18th day of August, 1906. That I did have a homestead in said Sec. and in Sec. 1, adjoining the same. Firstly being the S½ of SW¼ of Sec. 1 and the N½ of the NW¼ of Sec. 12. That I held the same until on or about the month of November, 1906, at which time I entered into an agreement or exchange with J. W. Thurston whose post office address is Glacier, Wash., under the following condition that for the sum of $50.00 paid me by said Thurston I then transferred my right of claim holding first to the SW¼ of the SW¼ of Sec. 1 & W½ of NW¼ & NW¼ of SW¼ of Sec. 12 all of said land being

in T. 39—N. R. 6 E. W. M. That I made final proof upon the 40 acres in Sec. 1 on October 5, 1909. That on or about the 20th day of Sep. 1909, I released the land in Sec. 12 and sold my improvements thereon to Elbert R. McPhee for the sum of $50.00 and he with his family has resided continuously and now resides upon said land." (Tr. 83-86.)

Affidavit of Dan O'Donnell in McPhee Record.

In this affidavit which has already been quoted in full on pages 31 and 32 of this synopsis, O'Donnell states that:

"He transferred his rights to John W. Thurston for the consideration of One Hundred Dollars ($100.00). That it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole. *That affiant is not acquainted with the legal description of said land according to the new survey of the same made in* 1907 *and is unable to state from his own knowledge the exact legal description of the land acquired by him from Cole and transferred by him to John W. Thurston.*" (Tr. 91-92.)

Evidence of John W. Thurston and Witnesses in Thurston Record.

"In the Matter of List No. 4, St. Paul, M. & M. Ry. Co., embracing the *E½ NW¼, NE¼ SW¼* Section 12, Township 39 N., Range 6 E. * * *

John W. Thurston, being first duly sworn, deposes and says: I am residing upon the above described tract of land, my post-office address being Maple Falls, Washington. I have been acquainted with the said land for the past ten years. The land was first settled upon within my knowledge in the year 1901, by Alfred Small who built a cabin thereon and made other small improvements in the way of clearing, trails, etc., residing on and occupying the land until March, 1902, when he transferred his improvements and claim to Daniel O'Donnell. Daniel O'Donnell, immediately upon acquiring possession commenced his residence on this land and continuously occupied the same until the fall of the year 1906, said Daniel O'Donnell during all of said period being qualified to make homestead entry and occupying land with a view to make said entry. In October, 1906, Daniel O'Donnell conveyed to me all his right and title to this land, together with the improvements thereon. I took up my residence on the land in December, 1906, and have lived there continuously ever since, and the improvements placed by me on said land are today reasonably worth the sum of $2,000. I was

at all times up to February 6, 1907, the date of the filing of the plat of said township 39 N., Range 6 E., entirely ignorant of the fact that the St. Paul, M. & M. Railway Company was laying any claim to this land. On May 9, 1902, the date of the filing of selection by the Railway Company, *the land above described* was actually occupied and improved, which occupation and improvements were readily discernible by the most casual inspection." (Tr. 121-122.)

The above affidavit was corroborated by Herman Steiner and H. E. Leavitt (Tr. 123), and by Thurston and all of his witnesses in the Thurston contest. (Tr. 137-162.) Most of this testimony has already been quoted.

With one possible exception Thurston and his witnesses do not mention the transaction in which Beebe and Thurston are alleged to have re-arranged their respective homestead claims. The possible exception is the following rather obscure evidence of Thurston:

"Q. Now when did you take up your residence on the land?

"A. That same Fall; being a quarter of a mile back from there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to

move my children and family up in the cabin, so I put a cabin there." (Tr. 160.)

Whatever the forty acres may have been that Thurston "dropped," he continued to claim the E½ NW¼ and NE¼ SW¼; and those three forties were sworn by him and all his witnesses (including O'Donnell) to be the same land claimed and occupied by O'Donnell at the time of its selection by the Railway Company, Thurston's contest with the Company involved that land, and his witnesses all swore that it was the identical land O'Donnell had settled upon and claimed on and prior to May 9, 1902.

Field Investigation in Thurston Record.

It appears by the Assistant Secretary's opinion of November 17th, 1916, that:

"The facts disclosed by the latter's (Thurston) final proof were further ascertained by means of a field investigation had by direction of the Comsioner of the General Land Office." (Tr. 111.)

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SETTLEMENTS OF BEEBE AND McPHEE

As the facts with respect to Beebe and McPhee subsequent to the alleged transfer from Thurston to Beebe are not in issue, the Land Office evidence concerning them is not abstracted. Suffice it to say that "February 6, 1907, Peter Beebe filed homestead application for the SW¼ SW¼, Sec. 1, W½ NW¼, NW¼, SW¼, Sec. 12, which was rejected by the register and receiver as to the lands in Sec. 12 for conflict with the railway selection. Upon appeal their action was affirmed by the Commissioner in a decision dated July 28, 1909, notice of which was served upon Beebe's attorney September 21, 1909. September 23, 1909, Beebe executed a relinquishment of the W½ NW¼ and NW¼ SW¼, Sec. 12, to the United States, stating therein that he has transferred 'my right and good will to E. R. McPhee.' The relinquishment which had been purchased by McPhee for the sum of $50. was filed September 27, 1909, concurrently with his homestead application. Beebe's application was allowed as to the SW¼ SW¼, Sec. 1, August 21, 1909 (H. E. 01692), upon which patent was issued April 23, 1915." (Tr. 79-80.)

THE EVIDENCE BEFORE THE TRIAL COURT

The evidence submitted to the trial court was brief and may be conveniently abstracted by subjects.

Construction and Occupancy of the O'Donnell Cabin.

Al Small testified: Small, working for Cole in August, 1901, laid the sides of a cabin three, four or five logs high on what is now the west half of Section 12. (Tr. 235.) The witness was next on the land in the spring — April or May — 1902. (Tr. 238.) No one was then occupying the cabin and it was still incomplete. (Tr. 238.) The walls were then laid in an open square about five and one-half feet high, but the structure had no roof or rafters. (Tr. 238.) The witness was not there again until the first of the winter—about November, 1902. The cabin was then completed, but no one was there. (Tr. 238.) About a year later in the fall of 1903, the witness visited the cabin again. (Tr. 238.) No one was living there, but the witness found food

and a bed in the cabin. He did not visit the cabin again until 1909. (Tr. 238.)

The same witness, recalled at a later stage of the trial, testified: In 1901 and 1902, O'Donnell was freighting for a mine in that vicinity and in 1902 for about three weeks O'Donnell went to the cabin at night and came down in the morning. (Tr. 245, 246.) The witness once went up to the cabin with O'Donnell before it was completed. This was probably in the winter of 1901 or 1902. (Tr. 245, 246.)

Mrs. Hannah Kline, O'Donnell's sister, testified: In 1901 and 1902 and 1903 her brother Dan O'Donnell was working for a mine in the vicinity of Maple Falls and claimed a homestead up there. She would not be certain about the time. (Tr. 67.) The family home at that time was at Lawrence (near Bellingham), and her brother Daniel made his home with the family there. He always voted at Lawrence. (Tr. 250.) He "would go away to work, but he never went away to make his home away from home." (Tr. 250.) As nearly as the witness could remember her brother spoke of claiming a homestead for about a year, and then gave it up. (Tr. 251.)

David Russell and Thomas Thompson testified: They cruised and selected the land in question for the Railway Company some time the last of April or the first of May, 1902 (Tr. 257, 259), crossing it several times to enable them to estimate the timber on each five acres. (Tr. 257, 258, 261.) They found no notices, cabins or improvements of any kind on the land, and no evidence that it was occupied by anyone. (Tr. 258, 259.)

The Two Surveys.

The official plat of survey of the township was filed in the local land office February 6th, 1907. Prior to that time there was an unofficial survey known as "the old Galbraith survey" (Tr. 236), and when the witness Small located the cabin for Cole it was by the Galbraith survey. (Tr. 235.) According to that survey the cabin was located in one of the east forties of Section 11. (Tr. 239.) It would be a question whether it was in the Southeast or the Northeast forty acres of the NE¼ of Section 11 by the Galbraith survey. (Tr. 256.) The official survey moved the east line of Section 11 westward approximately 825 feet—from fifty to fifty-five rods (Tr. 256), and by this shifting of

the lines the cabin fell into Section 12 of the official survey. (Tr. 236, 239.)

On plaintiffs' Exhibit 1 one of the defendants' witnesses, a surveyor, at the request of the court, indicated the relation of the corner common to Sections 1, 2, 11 and 12, of Township 39, according to the old Galbraith survey and the new official survey. (Tr. 256.)

There seems always to have been a great deal of uncertainty as to the location of the O'Donnell cabin with reference to the official survey. Small said the cabin "would be about fourteen rods from the old Galbraith line, which would bring it pretty close into the second forty—either the Southeast corner of the first quarter (NW¼ NW¼ of Section 12), or the Northeast corner of the second quarter (SW¼ NW¼ of Section 12)." (Tr. 235.) Mr. Cannon, attorney for McPhee at a prior stage of the proceedings, was called by McPhee as a witness, but was uncertain of the location of the cabin, and spoke of "McPhee measuring the lines as to where this cabin was." (Tr. 247.) Even the civil engineer said "it would be a question" in which forty the cabin was located according to the old survey. (Tr. 256.)

Description of Land Claimed by the Several Claimants.

Cole claimed the four east forties of Section 11 by the Galbraith survey. (Tr. 239.) His notices so described his claim. (Tr. 239, 245.) No evidence was submitted at the trial to show what land O'Donnell claimed. The testimony on this point will be carefully quoted. Al Small testified that "Cole sold his improvements to one by the name of Dan O'Donnell." (Tr. 236.) On a visit to the cabin in 1903 Small found a notice on the door signed by Dan O'Donnell. "It described that land as a homestead." (Tr. 48.) While the witness may have intended to state that the claim of O'Donnell was identical with that of Cole, which he had described, the matter is doubtful from a reading of his entire testimony. (Tr. 244, 245.) The only other witness who testified at the trial concerning the O'Donnell settlement was Fred Benson, who visited the cabin in 1904 and found an O'Donnell notice on the door, "the substance of which was that Mr. Dan O'Donnell, if I remember all right, had taken that for a homestead and gave the description. I don't remember the exact description it gave that he was taking." (Tr. 244.) To ascertain what O'Donnell

really claimed it was therefore necessary to refer to his own testimony as it appears in the Land Office record attached as an exhibit to the second amended complaint. *He twice swore that it was the land which has since been patented to Thurston.* In an affidavit sworn to by him before the Honorable W. H. Pemberton (now a Justice of the Supreme Court of the State of Washington), he specifically described his homestead claim as the E½ NW¼ and NE¼ SW¼, Section 12. (Tr. 181.) And when testifying as a witness for Thurston in the latter's contest with the Railway Company, he swore that the land he had claimed and occupied was the N½ NW¼, SE¼ NW¼ and NE¼ SW¼ of Section 12. (Tr. 151, 152.) This latter description includes one forty acres of the McPhee claim —the NW¼ NW¼ of Section 12—but in that respect was probably inadvertent, since the inquiry had to do only "with the tract of land embraced in Mr. Thurston's homestead application" (Tr. 142, 154), which did not embrace the 40 acres last mentioned. Read as a whole and in connection with the other testimony given at the same hearing, the gist of O'Donnell's testimony plainly was that the land Thurston was contesting with the Railway Company, viz., the E½ NW¼ and the NE¼ SW¼,

Section 12, was the same land that O'Donnell had claimed as a homestead until he sold it to Thurston. (Tr. 151, 154.)

The Transaction Between Thurston and Beebe.

Peter Beebe testified somewhat to the same effect as stated in his affidavit theretofore given McPhee: That in 1906 he settled upon and claimed as a homestead the S½ SW¼ of Section 1, and the N½ NW¼ of Section 12; that in November, 1906, in consideration of fifty dollars paid him by Thurston, he released to Thurston his rights in the SE¼ SW¼ of Section 1, and then re-arranged his own homestead to cover the three forties in Section 12, described as the W½ NW¼ and the NW¼ SW¼ of that section, besides retaining the SW¼ SW¼ of Section 1. (Tr. 83-86, 242-243.) Afterwards, in consideration of fifty dollars paid him by McPhee, he relinquished the three forties in Section 12 to McPhee and proved up on the SW¼ SW¼ of Section 1 (Tr. 243), for which he received patent.

Thurston's testimony relating to this transaction, as given in the Land Department's decision of

April 8th, 1916, quoted in the trial court's opinion on the motion to dismiss (Tr. 216) was as follows:

"Q. Now, when did you take up your residence on the land?

"A. That same fall; being a quarter of a mile back from there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin so I put up a cabin there."

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SPECIFICATION OF ERRORS

I

The District Court erred in overruling the separate motions of the defendants to dismiss the action upon the ground that the second amended bill of complaint failed to state facts sufficient to constitute a valid cause of action in equity.

II

The District Court erred in making and entering its final decree, dated October 3rd, 1922, adjudging that the defendants hold the legal title to the lands

in controversy in trust for the plaintiffs, and quieting the title of the plaintiffs to said lands against the claims of the defendants and those claiming under them.

III

The District Court erred in refusing to enter a decree quieting the title of the defendants to the lands respectively claimed and held by them against the claim of the plaintiffs, as prayed in the defendants' cross-complaint.

IV

The District Court erred in refusing to hold and decide upon the motions to dismiss that the only question presented by the second amended complaint was a question of fact as to whether or not any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

V

The District Court erred in refusing to hold and decide upon the final hearing that the only question presented by the pleadings and proof was a question of fact as to whether any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

VI

The District Court erred in refusing to hold and decide upon the motion to dismiss that the second amended complaint totally failed to show that any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the St. Paul, Minneapolis & Manitoba Railway Company.

VII

The District Court erred in refusing to hold and decide upon the final hearing that the evidence totally failed to show that any adverse right or claim to the land in controversy had attached or been initiated at the time of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company.

VIII

The District Court erred in refusing to hold and decide upon the motions to dismiss and upon all the evidence in the case, that upon the abandonment or disposal of the land in controversy by the claimants prior to the plaintiff, the pending, but unapproved, selection list of the St. Paul, Minneapolis & Manitoba Railway Company attached to said lands, and immediately segregated them from subsequent entry or claim by plaintiffs or their predecessors, as public lands under the homestead laws.

IX

The District Court erred in refusing to hold and decide that the adjudication of the United

States Land Department against the claim of the plaintiffs' predecessor Beebe, immediately prior to Beebe's relinquishment in favor of the plaintiffs, permitted the pending, but unapproved, selection list of the Railway Company to attach to the lands in controversy, and precluded the initiation of any right or claim thereto as public lands by the plaintiffs under the homestead laws.

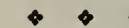
X

The District Court erred in holding and deciding upon all the evidence in the case that the plaintiffs were in any event entitled to prevail as to any of the land in controversy other than the Southwest quarter of the Northwest quarter (SW¼ NW¼) of Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., since there is no evidence whatsoever showing, or tending to show that any of the other land in controversy was occupied or claimed by any person whomsoever at or prior to the time of the filing of the selection list by the Railway Company.

XI

The District Court erred in refusing to hold and decide that in no event could the plaintiffs prevail

as to any of the land in controversy now lying in Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., except the portion thereof previously known and described as a part of Section Eleven (11), said township and range, and occupied or claimed under the homestead laws of the United States by some predecessor of the plaintiffs at the time of the filing of the railway company's selection list.



ARGUMENT

The discussion of these assignments may conveniently be grouped under a few headings. The first question to be considered naturally is whether the decision of the Land Department was one properly within the province of the court to review. The plaintiff in his various applications to the Land Department had submitted the affidavits of his witnesses, and had requested the Department also to consider its own records in the Thurston case. This was accordingly done and in the decision of the Secretary of the Interior, announced April 18th, 1916, upon McPhee's petition for the exercise of supervisory authority, the facts in the

two records were summarized and the case was found to turn upon *the question of fact* whether or not O'Donnell, from whom both McPhee and Thurston claimed, had, at the time of the filing of the selection list, been a settler on the Thurston tract or the McPhee tract. The situation was presented of witnesses testifying at Thurston's contest with the Railway Company that the settlement and improvements of O'Donnell were on Thurston's homestead, and later making affidavits in aid of McPhee, to the effect that such settlement and improvements were on the land McPhee was claiming. But the alleged settler himself, O'Donnell, in his affidavit for McPhee, declined to retract the testimony he had given for Thurston, that his settlement was on the Thurston homestead, and merely said he could not give the exact legal description of the place where he had settled, a*ccording to the new survey.* Herman Steiner, who had helped O'Donnell write his notice of homestead claim, and had signed it as a witness (Tr. 150) never gave McPhee an affidavit or in any way altered his testimony given at the Thurston contest (Tr. 148, 150), and the similar affidavits made by him (Tr. 182, 123) that the settlement and improvements of O'Donnell were on the Thurston homestead.

The Decision of the Land Department Was Based Upon a Disputed Question of Fact and Was Not Subject to Review and Reversal by the District Court.

The Land Department after reviewing the conflicting testimony in the McPhee and Thurston records correctly said: "From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the Railway's selection by virtue of O'Donnell's settlement." It then held that "McPhee failed to show any privity with O'Donnell or exactly what land O'Donnell claimed under his settlement." It is unnecessary to quote the remainder of the opinion, the gist of which was that the settlement of O'Donnell asserted by McPhee was the same as that asserted by Thurston, as transferee from O'Donnell, and that McPhee had failed to establish his contention that the O'Donnell settlement had in fact been upon the claim of McPhee, and not upon the homestead of Thurston, as the Department had previously found in the Thurston case, *substantiated by a field investigation.* (Tr. 218.)

In reversing the conclusion of the Land Department, the trial court used this language:

"The legal conclusion of the Commissioner *as to the fact of residence and the boundaries* of the O'Donnell claim so far as settlement and residence is concerned is erroneous."

This language, without more, demonstrates that the conclusion of the trial court was based upon a question of fact which he conceived had been erroneously determined by the Land Department. Of course the issue as to what land O'Donnell had occupied and claimed was one of unmixed fact. It could not be determined by reference to any rule of law, or otherwise than by the testimony of witnesses familiar with the acts O'Donnell had done to evidence the location and boundaries of his claim. O'Donnell himself was one of those witnesses, and there were many others. Some had testified that the claim comprised the Thurston homestead, others had testified that it comprised the McPhee homestead claim, and many had testified to both these things on different occasions. O'Donnell himself and his witness Steiner, the two men best acquainted with the fact, had supported Thurston in his contest with the Railway Company by their

sworn testimony, and were among the few witnesses who had never contradicted themselves. As will be hereafter pointed out in more detail, the question was one of great confusion, due to the shifting of the survey, and O'Donnell had been careful to say in the affidavit McPhee had obtained from him that he was "not acquainted with the legal description of said land according to the new survey of same made in 1907, and was unable to state from his own knowledge the exact legal description of the land acquired by him." (Tr. 92.) It is therefore respectfully submitted that in undertaking to weigh the conflicting testimony and to substitute its own appraisal thereof for the judgment of the Land Department, the trial court went beyond its proper province, as defined by many conclusive authorities.

Courts have no power to review findings of fact by the Land Department which were within its province and duty to make.

> *Daniels v. Wagner*, 237 U. S. 547, 59 L. Ed. 1102.

The conclusion as to ultimate facts finally reached by the Land Department must be accepted by the courts, although differing from the con-

ception of such facts entertained by the Department at previous stages of the controversy.

Greenamayer v. Coate, 212 U. S. 434, 53 L. Ed. 587.

A decision of the Land Department that a contestant was the owner of certain improvements under a statute giving such owner a preferential right to the land is binding on the courts, *unless there is no evidence to support it.*

Harnage v. Martin, 242 U. S. 386, 61 L. Ed. 382.

In the administration of the public lands the decision of the Land Department upon questions of fact is conclusive, and only questions of law are reviewable in courts.

Catholic Bishop of Nisqually v. Gibbon, 158 U. S. 155, 39 L. Ed. 931.

The Land Department of the United States is administrative in its character, and it has been frequently held by this court that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment therein is final.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. Ed. 90.

Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the Land Department, nor as to the methods by which he reached his determination.

DeCambria v. Rogers, 189 U. S. 119, 47 L. Ed. 734.

Where the question is one of fact as to whether one, when he demanded his patent certificate, as against other contesting claimants, had conformed to the requirements of the Donation Act, and this was determined by the Land Department after a contest in which the contending parties appeared and full opportunity was given to be heard; such determination is conclusive on all questions of fact and final to the same extent as those of other judicial or quasi-judicial tribunals.

Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929.

This court's recognition of the rule was recently expressed in *Christie v. Great Northern Ry. Co., et al.*, decided November 20th, 1922, 284 Fed. 702, in which it was said:

"The appellants are in no position to assert the illegality of the title. Upon their own showing they

are estopped by the proceedings in the Land Department. They attacked the validity of those proceedings on the ground of errors in fact or errors of mixed law and fact, and not upon errors of law, disregarding the rule that the jurisdiction of the courts may be invoked only upon the showing that the Land Department has disobeyed or misapplied the law applicable to the case."

Citing *Marquez v. Frisbie*, 101 U. S. 473.

The second amended complaint included the complete Land Office record in both the McPhee and Thurston cases. The conflicting evidence thus presented furnished no more ground for the court to entertain this suit than an identical complaint would have furnished had the prayer been one for the annulment of Thurston's patent. If the Land Office records, as submitted with the second amended complaint in the present case, are sufficient to justify a court of equity in holding the Railway Company trustee for McPhee, it follows that upon a similar complaint the court will require that Thurston be held trustee for the Railway Company of the adjoining land. (We may mention that no such suit is contemplated, as the timber has been cut from the Thurston homestead, practically destroying its value.) The same question of fact underlies both cases. It has been determined

in both cases by the Land Department upon a clear conflict of sworn testimony. It ought not to be re-examined by the courts either in one case or the other. The case is not one in which, by an error of law, McPhee has been prevented from exhibiting his evidence to the Land Department. There has probably never come to the Court's notice an application in which so many hearings, rehearings and reviews were granted and exhaustively considered as in the case of the McPhee homestead application. Two of these were presented by Attorney Phillips (Tr. 15-23), two by Attorney Cannon (Tr. 24-34), one by Attorney Gregory (Tr. 42-43), one by William Jennings Bryan (Tr. 48), two by Attorney Herrick separately and three by Attorneys Herrick, Kellogg and Thompson together (Tr. 49-107). The matter went to the Department of Justice, and the Attorney General addressed an inquiry to the Land Department (Tr. 107-108). The Assistant Secretary of the Interior replied to the Attorney General (Tr. 108-111), and the Assistant Commissioner of the General Land Office gave a final reply to McPhee (Tr. 113-114). Following each application in the transcript will be found a ruling of the Department thereon. It thus

appears that plaintiff had the very fullest opportunity to present his case to the Land Department, which in every instance decided against him upon a question of fact, and now to permit the same controversy to be retried in the courts would result in establishing the novel principle that the Federal courts may try *de novo* every disputed question of fact relative to the disposition of the public lands.

The Case Does Not Turn Upon the Geographical Location of the O'Donnell Cabin.

It seems to have been the idea of McPhee and his attorneys in the Land Department proceedings that if they could establish the fact that *after the official survey* the cabin built by Cole and completed by O'Donnell was located outside the Thurston homestead, and upon the McPhee claim, that fact alone would entitle them to prevail. Thus McPhee in his affidavit of April 18th, 1911, said not a word about what land O'Donnell had claimed, but laid great stress upon his statement that the O'Donnell "improvements were upon the south forty acres of the W½ NW¼, Section 12". (Tr. 36-37.) The trial court in its decision on the motion to dismiss (which was treated as fixing the law of the case at the final

hearing) seems to have acted upon this theory. The opinion rendered at that time states that "the cabin was built by Cole and O'Donnell, occupied by O'Donnell and was upon the SW¼ NW¼ of Section 12, at the time the script was filed." (Tr. 218.)

The Land Department had not determined the case on the basis of the location of the O'Donnell cabin, but upon the basis of the situs of the O'Donnell homestead claim. The importance of the distinction arises from the fact that when Cole and O'Donnell built the cabin there was no official survey, so that the builders of the cabin therefore were necessarily uncertain as to the particular subdivision in which the cabin would fall when the land came to be officially surveyed. As a matter of fact it was shown at the trial by a certified copy of the field notes of the Surveyor General (Defendants' Exhibit "F"; Tr. 254), and the testimony of a civil engineer, that the section and subdivision lines were shifted approximately 825 feet in that region. (Tr. 256.) By that shift about two-thirds of what had been the east line of forties of Section 11 became the west line of forties of Section 12—the present McPhee claim—and about two-thirds of what had been the west line of forties of Section 12 be-

came a part of the second line of forties of that section—the Thurston claim. (Tr. 256, Defendants' Exhibit "F".) *According to the old survey the cabin was barely over the line dividing the two tiers of forties, which, by the shifting of the survey, have now become substantially identical with the McPhee and Thurston claims, respectively.* (Tr. 256, Plaintiff's Exhibit 1.) To let the case depend, therefore, on the location of the cabin as it stands with reference to survey lines established many years later is to ignore the situation and the claim of O'Donnell as it existed at the time of the filing of the selection list. The official survey was not made until 1907, whereas the selection list was filed on May 9th, 1902, and the cabin is alleged to have been commenced even earlier.

The language of the act describing the lands subject to selection by the Railway Company is clear. Lands were open to selection "to which no adverse right or claim shall have attached or been initiated at the time of making such selection." The selection list filed May 9th, 1902, was unequivocal in claiming "that which will be, when surveyed, the W½ NW¼ and the NW¼ SW¼ of Section 12." (Defendants' Exhibit "A".) Merely because the

shifting of the survey cast upon the land so described a cabin built in furtherance of a homestead claim, it is not to be taken as proven that the builder of the cabin intended to claim that particular land. The question is not, Where does the cabin lie with reference to the subsequently made survey, but, where is the land that the builder of the cabin was then claiming? Obviously the builder himself knew better than anyone else in the world what land he really claimed, and he never stated that he claimed the land now claimed by McPhee. On the contrary, he testified and swore on several occasions that his actual claim was co-extensive with the Thurston homestead. (Tr. 151, 181.) By that testimony he aided Thurston to obtain title in his contest with the Railway Company. In his affidavit later given to McPhee, he merely said that "affiant is not acquainted with the legal description of said land *according to the new survey of the same* made in 1907, and is unable to state from his own knowledge the exact legal description of the land acquired by him." In short, the man who built the cabin upon which so much stress is placed has twice sworn that the land which he claimed as a homestead did not include the forty acres upon which

McPhee now claims the cabin was located, and he has further stated that he does not know the legal description of the land which he actually claimed "according to the new survey made in 1907," which immediately suggests that it was the running of the new lines in 1907 which left his cabin outside the boundaries the land he intended to claim in 1902. Since he has sworn, with the corroboration of numerous witnesses, that the actual land he claimed in 1902 was that which was subsequently patented to Thurston, it is the Thurston land and not the McPhee tract to which his "adverse right or claim had attached or been initiated," within the meaning of the statute, although perchance by the running of a later survey his cabin may have been cut off from the body of the former tract.

Had O'Donnell, and not Thurston, been the contestant with the Railway Company to the E½ NW¼ and the NE¼ SW¼ of Section 12, and had he testified for himself as he testified for Thurston that those subdivisions were the land to which his homestead claim had attached in 1902, the Railway Company could not have prevailed by producing McPhee and his witnesses to swear that the O'Donnell cabin was in fact upon the McPhee

claim. O'Donnell would have been protected by the principle of constructive residence, as recognized in *Great Northern Ry. Co. v. Hower*, 263 U. S. 702, 59 L. Ed. 798. While the court held in that case that upon the facts shown there was no constructive residence, it referred with approval to several decisions of the Land Department in which the residence of the homesteader upon one tract was made the basis of awarding him patent to another, when his residence upon the former was in the honest, though mistaken, belief that it was upon the latter, saying:

"In *Kendrick v. Doyle*, 12 Land Dec. 7, the entryman was honestly mistaken as to the limits of his claim, owing to conflicting surveys, and his house was built in a corner where the boundary line admittedly was in doubt, but the correct survey showed the house to be a little outside the line."

In that and several cases cited the "residence was held sufficient to satisfy the requirements of the statute."

It follows that it cannot be said that O'Donnell had initiated a claim to the McPhee tract, merely because his cabin may have been located within that tract as bounded by survey lines run many

years later, if, in fact, he did not claim that land, but claimed adjoining land. He himself, the witness to his homestead notice, and many others have sworn that the land he claimed was what has since become the Thurston tract. According to the statute authorizing the railway selection, the land was not exempt merely because there was a cabin upon it. It was exempt only if an adverse right or claim had attached to it. It is respectfully submitted, therefore, that in basing decision upon the location of the cabin, rather than upon the situs of the claim (to which the cabin was a mere incident), and in reversing the Land Department's determination, based upon a finding as to the situs of the claim itself, the District Court committed a second error.

The O'Donnell Claim Had Not Attached or Been Initiated at the Time of the Filing of the Selection List.

The selection list (Defendants' Exhibit "A") was filed in the Land Office May 9th, 1902. The evidence adduced at the trial fails to show that O'Donnell had initiated his homestead claim at that time, whether to the McPhee tract or the Thurston tract.

His purchase in October, 1901, of the improvements of the prior settler, of course, gave him no settlement right. 2 L. D. 188; 8 L. D. 623; 9 L. D. 329; 13 L. D. 142; 14 L. D. 90; 15 L. D. 69; 18 L. D. 446; 19 L. D. 91, 237; 26 L. D. 616; 27 L. D. 629.

In April or May, 1902, the cabin was roofless and unoccupied. (Tr. 238.) There is some testimony that in the summer of 1902, for about three weeks O'Donnell went to the cabin at night and came down in the morning. (Tr. 245.) But no one testified that he had established a residence or had settled upon the land in May, 1902. The testimony of O'Donnell's sister that he "would go away to work, but never went away to make his home away from home" and that he always voted at the precinct of the family home, is sufficient to show that her brother never in fact actually initiated a homestead claim. The homestead law requires settlement, and O'Donnell never made a settlement. But even if Mrs. Kline were mistaken in saying that her brother never made his home on this land, it is certain that he had not settled or commenced to make his home there on May 9th, 1902.

Of course defendants are bound only by the testimony adduced at the trial; their title cannot be af-

fected by the *ex parte* Land Office proceedings. The various land office records in the McPhee case attached to the complaint therefore, cannot be referred to for evidence in derogation of the patent. The sufficiency of the acts of O'Donnell to initiate a claim must be found, if at all, in the evidence taken at the trial.

The homestead law was enacted on May 20th, 1862, "to secure homesteads *to actual settlers* upon the public domain." It may be found at sections 4530 *et seq.*, of the U. S. Comp. Statutes, 1916:

Section 1 provides that a homesteader "shall be entitled to *enter* one quarter section or a less quantity of unappropriated public lands."

Section 2 provides that "any person applying to *enter* land under the preceding section shall first make and subscribe before the proper officer, and file in the proper land office an affidavit * * * that such application is honestly and in good faith made * * * and that he or she will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence and cultivation necessary to acquire title to the land applied for * * *; that he or she does not apply to enter the same for the purpose of speculation but in good faith *to obtain a home for himself* * * *, and upon filing such affidavit with the register or receiver

* * * he shall thereupon be permitted to enter the amount of land specified."

The following section goes on to provide that "no certificate, however, shall be given or patent issued therefor, until the expiration of five years from date of such entry, and if at the expiration of such time * * * the person making such entry * * * proves by two credible witnesses that he has *resided upon or cultivated* the same for a term of five years immediately succeeding the time of filing the affidavit * * * then * * * he * * * shall be entitled to a patent."

By section 5 of the original act (U. S. Comp. Stat., section 4552), it was provided that if it should be proved to the satisfaction of the register of the land office "that the person having filed such affidavit has actually changed his residence or abandoned the land for more than six months at any time, then and in that event, the land so entered shall revert to the government."

As stated in *St. Paul M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941:

"By that act, differing from the pre-emption law, the rights of the settler only attached to the land from the date of the entry in the proper land office."

Settlement, however, was required to follow the entry in the land office, and residence and cultivation for five years following the settlement were required in order to earn the title.

By the act of May 14, 1880 (U. S. Comp. Stat. 1916, sections 4536, *et seq.*), homestead settlements were first permitted to be made upon unsurveyed public lands. This statute also modified the homestead law in another important particular. By this act, for the first time, "both as to surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the land office." The *Donohue* case, *supra.* This result arose from section 3 of the act (U. S. Comp. Stat., section 4538), reading as follows:

"That any settler who has settled, or shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and to perfect his original entry in the United States land office, as is now allowed to settlers under the pre-emption laws to put their claims on record; and *his rights shall relate back to the date of settlement,* the same as if he settled under the pre-emption laws."

The *Donohue* case defines "settlement" as follows:

"Both under the pre-emption law and under the homestead law, after the act of 1880, the rights of the settler were initiated by settlement. In general terms it may be said that the pre-emption laws (Rev. Stat., sections 2257 to 2288, U. S. Comp. Stat. 1901, pp. 1381-1385), as a condition to an entry of public lands, merely required that the appropriation should have been for the exclusive use of the settler, that he should erect a dwelling house on the land, reside upon the tract, and improve the same. *By the homestead law, residence upon and cultivation of the land was required.* Under neither law was there a specific requirement as to when the improvement of the land should be commenced or as to the nature and extent of such improvement, nor was there any requirement that the land selected should be enclosed."

It is noteworthy that in every case cited by the plaintiff at the various stages of this litigation, the settler was actually living upon the land at the time of the railroad selection. Thus, in *Nelson v. Northern Pacific R. Co.*, 188 U. S. 108, 47 L. Ed. 406, the court said:

"In the year 1881, *three* years *before* the *definite location* of the road, the defendant Harry Nelson went upon the above land and *occupied* it and has

since *continuously resided* thereon." (The italics are Justice Harlan's.)

In *Northern Pacific R. Co. v. Trodick*, 221 U. S. 208, 55 L. Ed. 704, the court said:

"It appears from the evidence that one Martin Lemline established his residence on the land *with his family* in 1877 and *continued to reside* there until his death sometime in 1891. His improvements on the premises were of the estimated value of $1,000. * * * The company filed its map of definite location on July 6th, 1882, but one Lemline was then *in the actual occupancy of the land as a residence.*"

In *St. Paul, M & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941, it was stated:

"Jerry Hickey, having the legal qualifications, in March, 1893 *settled* upon unsurveyed public land. * * *Two years and eight months after the *settlement* by Hickey, that is, in December 1895, the Railway Company made indemnity selections embracing not only the *land upon which Hickey had built his residence*, but all the unsurveyed land contiguous thereto."

Let it be remembered that it was in this case that Chief Justice White said, as previously quoted:

"By the homestead law residence upon and cultivation of the land was required."

And it is important also to note that Chief Justice White said of the question of the propriety of the award of the land to the Railway Company:

"When that question is considered in its ultimate aspect it will be apparent, not only that it is related to the question of the *validity* of the settlement of Hickey, but it necessarily follows that the *validity* of that settlement in effect demonstrates the error of law committed by the Department in its ruling as to the Donohue entry."

Which makes it clear that the court was not only concerned with the settler's claim, but with the validity of that claim.

In *United States v. Great Northern R. Co.*, 254 Fed. 522, it was said:

"The evidence shows quite satisfactorily that one L. C. Thebo *settled* on the land in dispute some time prior to March, 1902, claiming it as a homestead, and *continued to live there* for 2 or 2½ years."

There is ample affirmative authority that the settlement which initiates the claim under the homestead laws is the first act of actual residence, and is not accomplished by putting up notices, or other acts of a transient nature. It would seem that *Great Northern R. Co. v. Hower*, 236 U. S. 702, 59

L. Ed. 798, is absolutely controlling. That case involved a contest between a settler and the present defendant, under the act of August 5, 1892, involved here. The land in dispute was the Northeast quarter of Section 2. That quarter section was selected by the Railway Company on March 24th, 1894. The homesteader Carter, claimed that he had settled on the land December 1st, 1893. At that time he purchased the improvements of a former settler upon a tract of unsurveyed land to the east.

"He thereupon established a residence in the cabin of a former settler and commenced the construction of a new dwelling house which he finished in the spring of 1894; that he moved his family into this dwelling house and had continued to reside therein and on said land with his family to the time of said hearing."

While intending at all times to claim the *Northeast* quarter of Section 2, his dwelling house and residence were, in fact, all situated in the *Northwest* quarter of Section 2. After establishing his residence he constructed, or took part in the construction of a trail "extending over and across a part of the Northeast quarter of Section 2," and also at times used a stable on said Northeast quar-

ter for storage purposes. Furthermore, he had posted notices of his claim thereon. The Northeast quarter of Section 2 was patented to him upon the ground that:

"Carter's residence was established and maintained in good faith and in the belief that his dwelling house was on the land embraced in his homestead application, and that such residence, taken in connection with the subsequent construction of trails and the stable or barn on the Northeast quarter of said Section 2, was a constructive residence on said Northeast quarter."

The Railway Company sued to establish title and finally prevailed in the U. S. Supreme Court.

It is apparent that Carter had done far more than O'Donnell at the time of the railroad selection. He had built a barn, constructed a trail and posted notice on the land in controversy, and in addition had established his residence only a quarter of a mile away, in the honest belief that he was living on the land he claimed. There is no evidence that O'Donnell ever settled on this land until many months after the scrip was filed, and according to his sister he never established a residence there at all. In the *Hower* case the Supreme Court held as follows:

"Conceding that Carter acted in entire good faith, and that he meant to comply with the law, it is nevertheless the fact that his settlement was upon, and the land cultivated was in, a different quarter section from that which he undertook to enter, and the quarter which he contends for was separated from the one which he occupied by a 40-acre tract. It is true that some time during his occupancy a trail was laid out, and a small stable constructed on the northeast quarter. But the fact remains that his residence and improvements by way of cultivation were upon a quarter section entirely separate and apart from the one to which title is now claimed. It seems to us to be going too far to say that, because of the trail to the northeast quarter and the small stable thereon, and the notices posted upon it, there was a constructive residence on that quarter, although the actual residence was upon the other quarter.

"We have been cited to no cases in the Land Department which go so far as is required in this instance in order to support title. We have been unable to find anything in our own decisions which would sanction such liberal treatment of the statutory requirement as to residence. * * *

"In this case it appears that the residence was not upon any part of the tract claimed by the homesteader; nor was the residence upon a contiguous tract of land, but was entirely separate and apart from the land claimed. Under these circumstances we are constrained to the conclusion that the com-

plaint, upon its face, made a case entitling the plaintiff in error to the relief sought. * * *

"The right (of homestead) is a statutory one, and in this case it was essential to show actual residence upon the land as a prerequisite to the granting of a patent and obtaining title to the same."

In *Small v. Rakestraw*, 196 U. S. 403, 49 L. Ed. 527, it was held that:

"A residence for voting purposes in another precinct from that in which a homestead entry lies precludes the entryman from claiming residence at the same time on the land for homestead purposes."

In *J. J. McCaskill Co. v. United States*, 216 U. S. 504, 54 L. Ed. 590, the homesteader's house was unfit for habitation. He had never moved his family there and he did not stay there more than one night in a week. The court cancelled his patent at the suit of the government, and summarized the requirements of the homestead law as follows:

"It may be well here to consider what the law requires. It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the 'application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other persons.' That applicant will honestly endeavor to comply with

the requirements of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a *home*, and to secure the gift, the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two creditable witnesses.

"Residence and cultivation of the land are the price that is exacted for its payment."

In *Whaley v. Northern Pacific R. Co.*, 167 Fed. 664, the court said:

"Lastly, complainant has made a very weak showing under the homestead laws of the United States. It would be a very severe strain upon the liberality of the homestead act to extend its protection to complainant, who really never made an earnest effort to establish his actual home upon the place to the exclusion of any other home. He seems to have had a notion that 'representation' would do, and that this was possible by occasional visits to the place, followed by some slight evidences of occupancy and cultivation. I do not believe that such acts constitute that good faith demanded of one who claims as a homesteader. Inhabitancy is always required, and surely it is not a compliance with the law for a man to file on a tract of land with no intention of making it his home, with no purpose of living there, with no intention of cultivating the place and of acquiring it for a place to reside in. Occasional visits made for a day or

two every few months, when such visits are made solely for the purpose of complying technically with the law, do not constitute a compliance with the statute. To establish a residence under the homestead laws, there must be a combination of act and intent, the act of occupying and living upon the claim and the intention of making the place a home to the exclusion of a home elsewhere."

A claim of occupancy set up to defeat the right of indemnity selection cannot be recognized if it appears that at the date of selection the alleged occupant had not established residence upon the tract, but was maintaining a home elsewhere, although he may have fenced and cultivated the land and erected buildings thereon.

Banks v. Northern Pacific R. Co., 25 L. D. 542.

The homestead law is one "to secure homesteads to *actual settlers* upon the public domain." The act of May 4th, 1880, allowing settlement upon unsurveyed lands, provides that "the claimant's rights shall relate back to the date of *settlement*." Here, there had been no settlement at the time the selection list was filed, and in fact, according to the unbiased testimony of Mrs. Kline, there never was any settlement by O'Donnell at any time. The claim of Cole, of course, had been extinguished at

the time of the sale of the improvements to O'Donnell, and was no bar to the railroad's selection.

Oregon & California R. Co. v. U. S., 190 U. S. 186, 47 L. Ed. 1012.

If we are wrong in saying that O'Donnell had not settled on the land on May 9th, 1902, we are at least justified in saying that the question is so shrouded in doubt as to furnish no grounds for the annulment of the patent.

"The respect due to a patent, the presumptions that all the preceding steps required by law had been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof."

Maxwell Land Grant case, 121 U. S. 325, 30 L. Ed. 949.

In the case cited the court also said:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it

cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal."

To the same effect see:

Colorado Coal Etc. Co. v. United States, 123 U. S. 307, 31 L. Ed. 182; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 31 L. Ed. 747; *United States v. Des Moines, Nav. Etc. Co.*, 142 U. S. 510, 35 L. Ed. 1099; *United States v. Budd*, 144 U. S. 154, 36 L. Ed. 384; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 42 L. Ed. 144; *United States v. Stinson*, 197 U. S. 200, 204, 49 L. Ed. 724.

If the O'Donnell Claim was Extant at the Time of the Filing of the Selection List, it had Lapsed by Abandonment, and Allowed the Selection to Attach Several Years Before the Claim of Either Thurston or McPhee was Initiated.

It will be remembered that O'Donnell bought the improvements of Cole in 1901, and that Thurston did not buy the improvements of O'Donnell until

1906. The evidence is undisputed that at least three years prior to the purchase by Thurston, O'Donnell had abandoned the claim. His sister testified that he claimed the homestead "for something like a year, and then gave it up." (Tr. 251.) This was uncontradicted, and was given by the plaintiff's own witness. The land, then, was vacant and unoccupied at least from 1903 to 1906.

It appears to be the theory of the second amended complaint that the *homestead claim* of O'Donnell was susceptible of assignment and was in fact transferred by him to Thurston, who is afterwards alleged to have conveyed "his improvements and possessory rights to Beebe," who in turn relinquished in favor of McPhee, the plaintiff. These allegations ignore the settled rule that the so-called possessory rights of a homestead settler are personal to himself and incapable of transfer to another. It is firmly established that the only valid transfers which a settler may make are first, a sale of his improvements—that is, the physical property which he has placed upon the land, and not his inchoate right to earn the land by personal occupancy; and second, a relinquishment to the United States, which re-opens the land to new settlement

and entry. Therefore, one who purchases the possessory claim and improvements of another gets nothing but the physical improvements and does not thereby project back his own settlement to the date his assignor established residence.

If these principles are correct, O'Donnell passed nothing but his cabin to Thurston, and if at the time O'Donnell vacated the land the selection of the Railway Company attached to it and segregated it from entry, the later claims of Thurston, Beebe and McPhee were incapable of inception, since the land, from the time the railroad selection attached, was not public land.

The following is quoted from the recent decision of the Supreme Court of the United States in *Bailey v. Sanders*, 228 U. S. 603, 57 L. Ed. 985, as conclusively denying any right of sale of a homesteader's possessory claim prior to final proof:

"It is further contended that the homestead law does not prohibit, but impliedly permits, an entryman to agree, in advance of commuting his entry, to sell the land, and therefore that the Land Department made a mistake of law in canceling Hately's entry because of his agreement with Bailey. The contention is not sound. Section 2289 of the Revised Statutes, as amended by the act of March

3, 1891, 26 Stat. at L. 1095, 1098, chap. 561, U. S. Comp. Stat. 1901, pp. 1388, 1535, creates the homestead right and names the beneficiaries. Section 2290, as amended by the same act, requires any person applying to enter land under the preceding section to make affidavit that, among other things, 'he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, except, himself or herself.' It was under these sections that Hately's preliminary entry was made. Section 2291, in prescribing the time and manner of making final proof, requires the applicant to make 'affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred eighty-eight,' which permits alienation for church, cemetery, school, and other enumerated purposes, none of which is present here. Thus, the homestead law not only proceeds upon the theory that the land is to be acquired for the exclusive benefit of the entryman, but contains provisions which make it impossible for him to perfect his claim, after alienation or contract therefor, without committing perjury. True, Section 2301, as amended by the act of March 3, 1891, supra, under which Hately's entry was commuted, says nothing about alienation, but its only

purpose is to give the entryman an opition to substitute the minimum price of the land for a part of the five years of residence and cultivation otherwise required. In other respects the operation and application of Sections 2290 and 2291 are not affected by it. We are therefore of opinion that the Secretary of the Interior did not err in ruling, as he did, that 'entering into such forbidden agreement ended the right of the entryman to make proof and payment, and rendered him incompetent to further proceed with his entry.' "

In *Cascade Public Service Corporation v. Railsback*, 59 Wash. 376, 109 Pac. 1062, the Supreme Court of Washington, per Chief Justice Rudkin, said:

"It is firmly established that any contract or agreement by a homesteader to transfer his claim or any interest therein before final proof, except as expressly authorized by the laws of the United States, is contrary to public policy, and void."

Further authorities are cited in the opinions from which we have quoted, and are therefore unnecessary of inclusion in this brief.

Of course the entryman's improvements are valuable rights which he may legally convey, but the purchase confers no settlement right on the purchaser.

"The privilege which may and should be thus accorded to the settler is personal to him, because no transferable right is acquired by settlement, inhabitancy, occupation, cultivation or improvement of the public lands, and therefore, one who, after a railroad indemnity selection has been proffered or tendered and regularly noted of record in the local office, purchases the posessory claim and improvements of another, does not thereby strengthen the position resulting from his settlement upon the land or other initiation of claim thereto after such selection was noted of record. He would be acting with full knowledge of the selection and his rights would be subordinate to the inchoate claim of the company thereunder."

Dunnigan v. Northern Pacific R. Co., 27 L. D. 467.

To the same effect is *Sproat v. Durland*, 2 Okla. 34, 35 Pac. 682, 886.

The only way a settler can dispose of his rights in the land is by statutory relinquishment under the act of May 14th, 1880 (U. S. Comp. Stat. 1916, Section 4536.) *Persons v. Persons*, 113 Ia. 745, 84 N. W. 668; *Palmer v. March*, 34 Minn. 127, 24 N. W. 374.

That section provides that "when a preemption homestead or timber culture claimant shall file a

written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

While a relinquishment is not a contract, but merely releases the homesteader's claim to the United States, and has no effect until filed (*Fain v. United States*, 209 Fed. 525, 126 C. C. A. 347), it has been held to create a statutory right on the part of the succeeding entryman to make application for the land. *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941. But in considering whether the settlement claim of O'Donnell was transferable to Thurston, it is sufficient to say that no relinquishment by O'Donnell was ever "filed in the local land office," but the transfer of right was attempted to be made by personal contract, and was therefore ineffective under the authorities cited. In short, we are not obliged to consider what rights the succeeding claimants would have obtained had O'Donnell relinquished the land to the United States, as he never did so. He simply abandoned the land, and about three years later sold his improvements.

The most that can be said of the effect of the transfer from O'Donnell to Thurston is that the existing claimant abandoned his possessory rights in 1903, and several years later sold his improvements and that thereupon the succeeding claimant attempted to initiate a new right. We are therefore brought to the consideration of the effect of the then pending selection list as segregating the land from entry and preventing the attachment of any new adverse claim.

The act of Congress under which the selections were made (27 Stat. 390, approved August 5, 1892) recites that under ruling of the General Land Office, the extension into Dakota Territory of the limits of the grants of land made by Congress to aid in the construction of several lines of railroad now owned by the St. Paul, Minneapolis & Manitoba Railway Company had been denied, and in consequence of said rulings settlers had gone upon said lands, who, under more recent construction of said grants, were liable to be ejected from their claims; and provides for the relinquishment by the railroad of such lands.

Section 2 permits the Railway Company to select, in lieu of the lands so relinquished, "an equal

number of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or been initiated at the time of the making of such selection."

Section 3 provides that upon the filing by the Railway Company at the local Land Office of a list describing the tract or tracts selected and the payment of the fees prescribed by law and *the approval of the Secretary of the Interior*, he shall cause to be executed in due form and delivered to said Company a patent of the United States conveying to it the lands so selected.

Section 3 further provides that in case the tract so selected shall be unsurveyed, the list filed by the company in the local Land Office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within the period of three months after the lands including any such tract shall have been surveyed and the plats thereof filed in the local Land Office, a new selection list shall be filed by said Company describing such tracts according to survey, etc.

It is apparent from this statute and from the decisions construing similar laws that a selection by a Railway Company of *indemnity* lands does

not become complete or final until approved by the Secretary of the Interior, but that, from the time of its filing and notation upon the Land Office records, it constitutes a continuing claim of inchoate title on the part of the Railway Company, segregating the lands from homestead or other entry during the interim between its filing and approval. In other words, the whole force of the selection is not spent on the day the list is filed, but it continues to assert itself until final approval, with the effect of preventing the attachment of any other claim to the land during the interval.

In considering the rights of a Railway Company under a selection of indemnity lands, it must be distinctly borne in mind that such rights are of a different character, and attach at a different time, from the claim to lands within the primary or place limits. In the case of primary lands the Railway Company's claim attaches and is measured once and for all time by the situation existing at the time of its definite location. No act of selection on its part, or approval by the Secretary of the Interior is required. On the other hand, as to indemnity lands the Company acquires no interest in any specific selections until a selection is made with the

approval of the Land Department, and since the selection of lands of the latter class requires the approval of the Secretary to give it finality, it is obvious that until it obtains that approval it constitutes a continuing claim on the part of the Railway Company to the lands covered by it.

The difference between a claim to primary lands and one to indemnity lands is succinctly stated in *Oregon & C. R. Co. v. United States*, 189 U. S. 103, 47 L. Ed. 726:

"Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."

The most recent discussion of the rights acquired by an indemnity land selection appears in *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 55 L. Ed. 258, where the subject was exhaustively considered, and the

companion case of *Northern Pacific R. Co. v. Wass*, 219 U. S. 426, 55 L. Ed. 280. The facts in the Wass case are typical:

"While a filed selection by the St. Paul & Northern Pacific Railway Company of land within the indemnity limits of a railroad grant *was awaiting the action of the Secretary of the Interior*, Fred Wass, in April, 1899, entered upon the land with the intention of making it a homestead, and continued in possession, making improvements, etc| * * * The selection was subsequently approved and a patent for the lands was issued by the governor of Minnesota, all rights under which became vested in the Northern Pacific Railway Company."

A suit ensued between the Railway Company and Wass, involving the title, the Railway Company claiming by virtue of its prior selection, and Wass asserting that his homestead claim, though subsequent to the selection, was superior thereto. It will be observed that this case is an exact parallel to the case at bar in so far as the rights of Thurston, Beebe and the plaintiff are concerned, which were initiated subsequent to the Railway Company's selection, unless (a) Thurston, Beebe and the plaintiff can relate their rights back to the O'Donnell claim, which they cannot do, as already demonstrated in this brief; or (b) the Railway Com-

pany's selection, being incapable of attaching to the land then claimed to have been occupied by O'Donnell, lost all its force and could not attach to the lands after O'Donnell abandoned them. The decision of the Supreme Court was in favor of the Railway Company. The court stated the rule applied by the Land Department in the practical execution of land grants from the beginning, as follows:

"Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancelation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

"There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

"What effect has been given to a pending railroad indemnity selection?

"Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal; but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. *Dinwiddie v. Florida R. & Nav. Co.*, 9 Land Dec. 74. In the circular of September 6, 1887 (6 Land Dec. 131), issued immediately after the general revocation of indemnity wihtdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. *In fact a railroad indemnity selection, presented in accordance with departmental regulations, and accepted or recognized by the local officers, has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws.*"

The court then held:

"It is beyond dispute on the face of the granting act of July 2, 1864 (13 Stat. at L. 365, 367, chap. 217), and of the joint resolution of May 31, 1870 (16 Stat. at L. 378), extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land

within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that, as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company, subject to the approval of the Secretary of the Interior, that a construction which would deprive the railroad company of its substantial right to select, and would render nugatory the exertion of power of the Secretary of the Interior to approve lawful selections when made, would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be apportioned at will by others, would be destructive of the right of selection, is not only theoretically apparent from the mere statement of the proposition, but has, moreover, in actual experience, been found to be the practical result of carrying that doctrine into effect. See 25 Ops. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view, a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others, originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection, when made, should not include lands which, at that time,

were subject to the rights of others. The requirement of approval by the secretary consequently imposed on that official the duty of determining whether selections were lawful at the time they were made, *which is inconsistent with the theory that anyone could appropriate the selected land pending action of the Secretary.* The scope of the power to approve list of selections, conferred on the Secretary, was clearly pointed out in *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. Ed. 687, 694, 10 Sup. Ct. Rep. 341, where it was said that the power to approve was judicial in its nature. Possessing that attribute, the authority therefore involved not only the power, but implied the duty, to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior was to bring into play the *elementary principle of relation, repeatedly sanctioned by this court* and uniformly applied by the Land Department from the beginning up to this time, under similar circumstances, in the practical execution of the land laws of the United States."

As authority for applying the doctrine of relation and the principle that, in contests involving the

public lands, the first claimant in point of time is deemed to be the first in right also, the court quoted from *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424:

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus, the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

That decision establishes the continuing segregative force of a selection list upon the lands covered

thereby, and approves the Land Department practice on the subject. A reference to the decisions of the Land Department discloses several cases precisely in point here.

In *Northern Pacific R. Co. v. Fly*, 27 Land Dec. 464, the Railway Company had filed an indemnity selection of land for which a prior timber culture application had been tendered. The timber culture applicant failed to complete his entry, and thereafter the claimant Fly filed a homestead entry. Upon appeal from the decision of cancelation the Secretary of the Interior said:

"Counsel for Fly, in the argument of the case, refers to several decisions of the supreme court in which it is held that the condition of the land at the date of the passage of the act making the grant, or the definite location of the road, determines the company's rights under the grant, even though the condition is afterwards changed, that is, if at the date of the act or at the time of definite location, the land is embraced in a homestead entry, it is not passed by the grant, even though the entryman thereafter abandons the land.

"These cases, however, all involve lands within the primary or granted limits, and if, for any reason, a tract within these limits does not pass because of a claim thereto existing at the time of the attachment of rights under the grant, the same

is forever excepted and the company must look to its indemnity limits for a tract in lieu thereof.

"Within the indemnity limits of the grants to aid in the construction of railroads, the rights of the grantee claimant attach only upon selection, and such selection may be made at any time when the land is free. The fact that such land is at one time not free and therefore not then subject to selection, does not preclude its subsequent selection. For administrative reasons it is deemed better that an indemnity selection proffered or tendered for land which is not free at the time should be rejected by the local officers, but this is a matter within the control of the Secretary, under whose direction the selections must be made. In many instances the prescribed practice requiring a rejection of selections proffered or tendered for land included in an existing adverse claim, was departed from by the local officers and the selections allowed to go of record notwithstanding such prior adverse claim, and this action of the local officers was acquiesced in by your office and by the department to the extent of permitting the selection to stand of record subject to the perfection of the adverse claim. The case at bar is one of this class and in departmental decision of August 11, 1894, it was held, as before stated, that 'upon completion of entry by Kincaid, the company's selection will be canceled.' While not amounting to an approval of the selection, this was, in effect, an order permitting the selection to stand, saving only the rights of Kincaid, the prior adverse claimant; that is, it was a

direction that should Kincaid fail to complete entry of the land, the selection already allowed to go of record, would be recognized, if no other objection thereto appeared upon further examination. The reason for this action grew out of the fact that many years had elapsed since Kincaid had tendered his application, and it might have been that he had abandoned his claim to the land, or was otherwise unable to complete the same.

"This in nowise affects the holding that the status of the land at the date of proffering or tendering selection, should control the action of the local officers in rejecting the same or allowing it to go of record, but where, contrary to the practice adopted in the administration of these land grants, the local officers erroneously allow a railroad indemnity selection to go of record during the pendency of a prior adverse claim, it is within the authority of the Secretary to permit such selection to stand, and to give it his final approval upon the subsequent abandonment or other elimination of the adverse claim. This results from the fact that a railroad indemnity selection does not become finally effective until approved by the Secretary, and if at that time the land is free and the company is entitled to the indemnity, the fact that there was an adverse claim to the land when the selection was proffered or tendered constitutes no legal obstacle to the Secretary's approval under the law."

In the similar case of *Northern Pacific R. Co. v. Dean*, 27 Land Dec. 462, it was said:

"It would be inequitable as well as illegal to hold that a mere application to file, never completed, and under which no right is now being asserted, served to reserve the land, and thereby invalidate a selection of the land, in all respects regular as far as shown by the record before me, to the end that applications presented at a date subsequent to the selection of the land might take precedence over the selections."

A controversy identical to the present was decided in *Dunnigan v. Northern Pacific R. Co.*, 27 Land Dec. 467. Dunnigan appealed from the rejection of his application, filed October 31st, 1887. The Northern Pacific had selected the land on December 17th, 1883, prior to the accrual of Dunnigan's claim. He alleged, however, that the tract was not subject to selection by the Railway Company, "for the reason that said tract was settled on by one Theodore Buschman in the spring of 1881, and has been continuously occupied and cultivated ever since. That said Buschman died, while residing on the claim, in February, 1884, that affiant purchased the improvements of said Buschman and made settlement thereon in Feberuary, 1884, and moved thereon March 4, 1884, and has resided thereon continuously and cultivated the same ever since." The Secretary said:

"The privilege which may and should be thus accorded to the settler is personal to him, because no transferable right is acquired by settlement, inhabitancy, occcupation, cultivation or improvement of the public lands, and therefore one who, after a railroad indemnity selection has been proffered or tendered and regularly noted of record in the local office, purchases the possessory claim and improvements of another, does not thereby strengthen the position resulting from his settlement upon the land or other initiation of claim thereto after such selection was so noted of record. He would be acting with full knowledge of the selection and his rights would be subordinate to the inchoate claim of the company thereunder. It follows, therefore, that the rehearing had in this case was unnecessary."

The Dunnigan case was followed in*Southern Pacific R. Co. v. Cherry*, 27 Land Dec. 470, and *Northern Pacific R. Co. v. Coryell*, 27 Land Dec. 513.

In *Ross v. Hastings & Dakota R. Co.*, 29 Land Dec. 264, it was again held that a purchaser of the possessory claim and improvements of a settler upon land at the date of indemnity selection thereof does not by such purchase strengthen the position resulting from his own settlement upon the land at a date subsequent to the selection. To the same effect is *Hastings & Dakota R. Co. v. Sonnenberg*, 29 Land Dec. 554.

Upon the facts the case of *Tarpey v. Madsen*, 178 U. S. 215, 44 L. Ed. 1042, is in point, although it involved lands within the place limits of a railroad grant, instead of an indemnity selection. The railroad's map of definite location was filed on October 20th, 1868. At that time the tract was occupied by a qualified pre-emption claimant. That claimant, on May 29th, 1869, filed a declaratory statement alleging settlement on April 23rd, 1869. Afterwards he abandoned the land, and in 1896 the defendant Madsen filed a homestead entry therefor in the local land office, which entry was allowed, and after an appeal to the Commissioner of the General Land Office he received a patent. The Railway Company in the meantime had sold the land to the plaintiff. The court held that the case must be determined by the state of the record evidence in the land office and that as the pre-emption claimant's declaratory statement had not alleged settlement prior to the filing of the map of definite location, "its rights ought not to be defeated, long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation."

It may be argued that this decision is inconsistent with that announced in *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941, but there is no inconsistency between the two cases. In the *Donohue* case Hickey, the original claimant, made settlement in March, 1893, filed homestead entry July 22nd, 1896, immediately after survey, and he and his heir continued to assert the rights so initiated until the filing of the relinquishment by his heir, pursuant to which Donohue entered the land under the Timber and Stone Act. The railroad's selections were not filed until several years after the settlement by Hickey. All these facts appeared of record, not merely by testimony taken in the Land Department, but by the homestead application and other documents filed there by the claimants. It was held (a) that the settlement by Hickey exempted the land from selection by the railroad, and (b) that the statutory right of Hickey's heir to relinquish, and of Donohue to make application for the land, prevented the attachment of the Railway Company's selection at the time of the relinquishment.

In the *Tarpey* case the court made it clear that had it been dealing with a controversy between

the original pre-emption claimant and the railway company, "every intendment should be in his favor in order to perfect the title which he was seeking to acquire." The court continued:

"But when the original entryman, either because he does not care to perfect his claim to the land, or because he is conscious that it is invalid, abandons it, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company (grantee of Congress) of its title—apparently perfect and unquestioned during these many years—he does not come in the attitude of an equitable claimant to the consideration of the court."

Giving full weight to both cases, the result is that in a contest between a railway company and an entryman himself, or those who have by statutory proceedings succeeded to his rights *by relinquishment*, the individual claimant's rights will be considered as having attached at the date of actual settlement, but that as between the railway company and any other, the question must be determined by the state of the record made between the railway company *and that other* in the land office, and since, in the present case, O'Donnell abandoned the land without ever placing any record evidence of his alleged settlement of record in the

land office and has never since asserted claim thereto, the *Madsen* case is decisive authority for the proposition that the railway company's rights are not to be defeated by "fugitive and uncertain testimony of occupation" on his part. And this contention is the more forcible when it is borne in mind that O'Donnell himself refused in his affidavit for McPhee to state what lands he had claimed, but merely swore that, without being able to state the description of the land claimed by him, it was what he acquired from Cole and sold to Thurston.

This is a suit in equity, and one of the maxims of equitable jurisprudence is that when the equities are equal the first in point of time shall prevail. That principle has been applied in the authorities already cited, holding that in controversies affecting the public lands the first in time is the first in right. The only argument that can defeat its application here is that when the original selection list was filed it failed to attach to the land because of O'Donnell's claim, and that when O'Donnell's claim was terminated the selection list had no existing vitality which would allow it to attach to the land.

Plaintiff's Claim of Title Cannot Prevail in any Event to More Than Forty Acres of the Land in Controversy.

In this and the preceding subdivisions of the argument, we waive, for the time being, all questions arising under the conflicting surveys, and treat the case as though there had never been any survey, except the official one. In another portion of the argument we have endeavored to show that there was no settlement or subsisting claim to the land by O'Donnell, at the time of the filing of the selection list. We will now undertake to demonstrate that even though O'Donnell had a claim to the land on May 9th, 1902, it covered only one forty acre tract of the land now claimed by McPhee.

Little need be said on this question, in addition to what the court has already said in the memorandum opinion of July 19th, 1921:

"The cabin was built by Cole and O'Donnell, occupied by O'Donnell and was upon the southwest quarter of the northwest quarter of Section 12 at the time the scrip was filed; that O'Donnell conveyed his right to his claim, *including the southwest quarter of the northwest quarter* to Thurston, and that Thurston conveyed his right to the *southwest quarter of the northwest quarter* to Beebe

is undisputed. The fact that each filed upon their claims in harmony with this division is conclusive, and Thurston testifies that 'being a quarter of a mile back from there I drops one forty and takes another forty." *The forty that he dropped was the forty that Beebe obtained,* on which was the cabin, and the forty Thurston took was the forty he got from Beebe."

We have never comprehended why the trial court, although finding a privity between O'Donnell and McPhee as to only forty acres of the land in controversy, should have decreed the entire 120 acres to the plaintiff.

The claim of C. C. Cole is described by Al Small, the only witness on the subject, as consisting of the four east forties of Section 11, by the Galbraith survey (Tr. 239). Those four forties are partly included in the four west forties of Section 12, by the official survey. Cole sold his improvements and right of possession to Dan O'Donnell in October, 1901. That, of course, was all he could sell, the homestead claim not being susceptible of transfer. *Bailey v. Sanders,* 228 U. S. 603; 57 L. Ed. 985. The transaction, however, constituted indisputable evidence of Cole's abandonment of the claim. *Love v. Flahive,* 205 U. S. 195; 51 L. Ed. 768.

It remained for O'Donnell to initiate his own homestead claim, and to define its boundaries, which might or might not coincide with those of Cole. (See Land Office Decisions already cited at page 87 of this brief.) It might possibly be assumed from the testimony of Small in the present record that O'Donnell claimed the same land as Cole, but Small did not undertake definitely to describe the O'Donnell claim. O'Donnell himself said his claim consisted of what became the Thurston homestead, but assuming that the evidence of Beebe overcomes this, the most that can be said, and the most the trial court found was that only the SW¼ NW¼, Section 12, was common to the claims of both O'Donnell and McPhee. This is the forty of the O'Donnell claim which Thurston, his immediate successor, is said to have traded to Beebe for the forty in Section 1, on which Thurston built his house. The other three forties of the O'Donnell claim, lying directly east of the present McPhee claim, passed from O'Donnell to Thurston, were never disposed of by him, and were subsequently covered by the patent of the United States. That patent was issued on the sworn testimony of O'Donnell, and of most, if not all the witnesses who have

since been relied upon by McPhee. It is therefore submitted that even should the court conclude that O'Donnell had settled upon and initiated a claim to any of the land in controversy at the time of the filing of the selection list, that claim cannot now operate in favor of the plaintiff, except to the extent that it coincides with the plaintiff's present claim; and as the coincidence is limited to the forty acre tract containing the cabin, viz., the Southwest quarter of the Northwest quarter, Section 12, it follows that the plaintiff's relief must in any view of the testimony be limited to that one tract.

In View of the Conflicting Surveys it is Certain that if O'Donnell Claimed Any Part of the Present McPhee Tract in 1902, He Claimed Land in Section 11, and Not the Land Selected by the Railway Company in Section 12.

Plaintiffs' Exhibit 1, as marked by the surveyor at the court's request (Tr. 255-256) and the certified copy of the field notes from the Surveyor General's office (Defendants' Exhibit F) show that the four west forties of Section 12 of the official survey contain about two-thirds of the four east forties of Section 11, by the Galbraith survey. The latter was the only survey O'Donnell knew.

The question arises: Assuming that O'Donnell actually had a settlement right, located in Section 11, could it later be asserted to any part or all of Section 12, when the official survey was drawn to include in Section 12 a part of what had formerly been Section 11?

The Railroad Selection List filed May 9th, 1902 was unequivocal in claiming "that which will be when surveyed the West half of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 12." (Defendants' Exhibit "A".) Regardless of the shifting of the survey, the Railway Company thus bound itself to take whatever land might fall within the description stated. The predecessor of the plaintiff at the same time is said to have been specifically describing and claiming land distinct from that claimed by the Railway Company, under conditions as then known. About one-third of what was then known as the east line of forties of Section 11 by the Galbraith survey still remains a part of the east line of forties of Section 11 by the official survey. We submit that it is more reasonable and just in such a case for a settler's claim to follow the specific description which he has

publicly advertised to the world when the lines of the survey shift, than to allow a successor of his to take land of an entirely different description, as to which an unequivocal *bona fide* claim has in the mean time arisen.

The question is admittedly difficult of solution, but some indirect light is shed on it by the authorities. Chief Justice White in the *Donohue* case, *supra*, spoke of the possibility of confusion and conflict under the law allowing pre-emption and homestead settlements, in advance of survey:

"As under both the pre-emption and homestead laws, whether the settlement was made upon surveyed or unsurveyed land, the law did not make it necessary to file or record a claim in respect to the land until a considerable period of time had elapsed after the initiation of the right by settlement. It necessarily came to pass that controversies arose from rights asserted by others to land upon which a settlement had been made, but as to which no exact specification appeared upon the records of the land office of the location and extent of the land claimed."

He went on to speak of the settled administrative rule "that the notice effected *solely by improvements* upon the land is confined to land within the particular quarter section on which the im-

provements are situated," and that in cases where the settler's claim embraced "not only land within the legal subdivision on which the improvements had been placed, but contiguous land lying in another quarter section, the ruling has ever been that any conduct of the first settler adequate to convey actual or constructive notice to a subsequent settler that the claim had been initiated not only to the land upon which the improvements were situated, but as to contiguous land, even though in another quarter section, sufficed to preserve the rights of the first settler."

The present case being of the latter class, that is, one involving a claim to lands in different quarter sections, it was necessary for the claimant to give "actual notice to an intruder of the extent of the settlement claimed." Any notice given by O'Donnell must have referred to land then differing entirely from and now corresponding only in part to the lands selected by the Railway Company.

By the pre-emption laws (now repealed) specific provision was made for conflicting settlements upon unsurveyed lands. Section 2274, Revised Statutes (U. S. Comp. Stat. 1916, p. 5324) provided

that if whenever two or more persons settled upon unsurveyed lands it should be found after survey thereof that they had settled upon the same legal subdivision, such settlers might make a joint entry of the lands, or that one settler might perform the statutory requirements for all, after having contracted with the other settlers to convey to them their proper shares. There is no similar provision in the homestead laws, but by administrative rule of the Land Department the practice is to allow conflicting rights acquired prior to survey to be adjusted through agreement of the parties. 6 L.D. 826; 7 L.D. 3; 8 L.D. 536; 18 L.D. 335; 13 L.D. 19; 20 L.D. 490; 21 L.D. 224; 18 L.D. 297;28 L.D. 412; 28 L.D. 510. It is also the rule of the Land Department that rights by settlement cannot be acquired or maintained on different tracts at the same time, 8 L.D. 96, 200, 461; 9 L.D. 63 and that settlement prior to survey, marked by distinct boundaries, cannot be enlarged to the injury of subsequent settlers. 1 L.D. 414, 431. In the cases last cited the rule is said to be that when "a claim is located upon the ground before survey, and other claims are afterwards made and located with reference thereto, the party

first locating and making known the extent of his claim will not be permitted to enlarge the same to the injury of subsequent locators, whose claims have been made to conform to such first location."

When it was found by McPhee, or his predecessors, that Section 11 claimed in part by them, had been shifted to the west by the official survey, reason and justice would seem to require that their claim should shift with the survey. If there was no other occupant or claimant of the land newly covered by their description, no one would be harmed. If there was an adverse claimant, the conflicting rights might have been adjusted through agreement of the parties under the settled practice of the Land Department, or by a court of equity, if agreement were impossible. Certainly, such a procedure would have been more equitable than to allow the claim to be shifted in the opposite direction from which the survey moved, to the injury of one who had by a claim of record in the Land Office, described his claim once and for all as definitely lying in Section 12, wherever Section 12 might fall.

But if this reasoning be incorrect, it is at least true that the plaintiff can claim no more of the

land now in Section 12 than his predecessor, O'Donnell, claimed when it was part of Section 11. The rules of equity are not circumscribed by survey lines. It was only lands to which an adverse claim had attached or been initiated that the Railway Company was not allowed to select. Conceding that O'Donnell had a settlement claim, it covered only about two-thirds of the forty acre tract to which this controversy has been reduced. If his successor McPhee prevails at all, it can therefore be only as to that distinct land in the present Southwest quarter of the Northwest quarter of Section 12 which once was included within the Section 11. The exact description of the coincident land may be obtained from the field notes of the official survey, which are in evidence as Defendants' Exhibit "F."

The decree should be reversed.

Respectfully submitted,

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CLINTON W. HOWARD,

Solicitor for Bellingham Bay Improvement Company.